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In the SUPREME COURT OF THE UNITED STATES

KAREN SCHULTE,
Petitioner
vs.
JOHN E. POTTER,
Postmaster General, USPS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standard of review for bench trials is properly understood by the courts of review below.

2. Whether the Tenth Circuit used an improper standard to test the evidentiary basis for the lower court's findings of fact.

3. Whether the Tenth Circuit improperly denied Petitioner relief from the lower court's evidentiary rulings.

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OPINIONS BELOW

None of the Orders issued in the instant case has been reported.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC 1254 (1). The Order and Judgment under review is that of the Tenth Circuit Court of Appeals, January 26, 2007, Case No. 05-5209, "Pet. App. A." Appellant's Petition for Rehearing and for En Banc Review was denied without comment by Order of March 29, 2007, "Pet. App. D."

CONSTITUTIONAL AND STATUTORY PROVISIONS

All relevant law is contained in Appendix E.

STATEMENT OF THE CASE

Karen Schulte ("Petitioner" or "Schulte") was dismissed from her position at the United States Postal Service ("Respondent," "USPS" or "post office") on or about March 5, 2002.

Petitioner brought seven claims against the USPS, only two of which went to trial (1) failure to promote and (2) wrongful discipline, both as violations of the ADEA.

Schulte filed a motion challenging Respondent's discovery responses, which motion was disallowed by Order of the Northern District of Oklahoma, November 2, 2004, Case No. 03-CV-361, "Pet. App. C." During Schulte's trial on the merits, the trial court also disallowed evidence crucial to her theory of the case. Pet. App. A, 11a-13a.

On October 19, 2005, the District Court's Findings of Fact and Conclusions of Law, "Pet. App. B," held that Schulte had not proved age discrimination, a decision upheld by the Tenth Circuit on January 26, 2007. Pet. App. A.

Schulte asked for reconsideration, as well as for en banc review, claiming that the standard used by the Tenth Circuit to review Schulte's allegation of a faulty standard of proof below was itself faulty, both of which requests were denied by the Court on March 29, 2007. Pet. App. D.

REASONS FOR GRANTING THE WRIT

It is apparent that the Tenth Circuit believes that the standard under which it chooses to conduct its review of a lower court decision determines the degree of scrutiny to which that decision should be subjected, as the analysis below makes evident. The confusion that reigns in the appellate world over appellate-review nomenclature shows this error to be commonplace. *See, e.g., Dickinson v. Zurko*, 527 U.S. 150 (1999) (historical discussion of standards of review); *Concrete Pipe & Products of Cal. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), Thomas, J., concurring (discussing and distinguishing evidentiary and review standards); *Armour & Co. v. Wilson & Co.*, 274 F.2d 143, 155, 124 USPQ 115, 124-25 (7th Cir. 1960), Newman, J., with whom Rader, J., joins, dissenting ("'[F]acts,' 'primary facts,' 'subsidiary facts,' 'evidentiary facts,' 'ultimate facts,' 'physical facts,' 'documentary facts,' 'oral evidence,' 'inferences,' 'reasonable inferences,' 'findings of fact,' 'conclusions,' 'conclusions of law,' 'questions of fact,' 'questions of law,' 'mixed questions of law and fact,' 'correct criteria of law'...[W]e are all too frequently dealing in semantics.").

Of course, the legal and evidentiary issues that are brought before an appellate court should each be scrutinized with equal attention precisely to ensure that they are subjected to the proper standard.

Instead, as the standard of review becomes more "deferential," the reviewing court's gaze seems to grow in laxity. The instant matter is a perfect case in point. The Court should take this opportunity both to do justice in the individual instance and to offer guidance to the courts below as to the proper standard of appellate review for bench trials, notwithstanding any "deference" due the decision at issue.

I. CERTIORARI IS NEEDED TO CLARIFY THE APPELLATE REVIEW STANDARDS AT ISSUE

A. Sufficiency, Clear Error, and de Novo Review

The Federal Rules of Civil Procedure say that the "findings of fact" from a bench trial are to be subjected to a "clear error" standard on appeal, emphasizing the "due regard" accorded the trial judge's estimate of "the credibility of the witnesses." F.R.Civ.P. 52(a); Pet. App. E, 86a.

But that same Rule instructs that the appealing party may question "the **sufficiency** of the evidence supporting the findings." F.R.Civ.P. 52(b); Pet. App. E, 87a.

Now it is immediately apparent even on the face of the Rule that "sufficiency" and "clear error" are notions that operate independently of each other. *See, e.g., Dilley v Supervalu, Inc.,* 296 F.3d 958 (10th Cir. 2002) (challenge to sufficiency of evidence not permitted in instance where appealing party did not renew motion for JMOL at close of evidence; review conducted **instead** under plain error standard). How must they interact if Rule 52 is to be given its intended effect? And if a trial court factual assessment of witness credibility shows itself to be at odds with evidence in the record, does any degree of deference that may otherwise operate under a "clear error" standard diminish under a less deferential test for "sufficiency"?

"Sufficiency" is the pivot around which appellate review of bench trials should turn, a fact apparent even in the way in which that language is—regrettably without the least regard for the conceptual structure of the Rule--factored into the provision itself (embedded in §(b), but flinging itself about not only in reference to the subsection of the Rule in which it finds itself, but to the preceding and following subsections as well). Having "due regard" for credibility assessments and leaving the lower court's findings of fact intact unless "clearly erroneous"--especially in the sense in which those concepts operate in the Tenth Circuit, that is, like

an invitation to evaluate the supporting evidence under a substantial evidence standard instead—must be modified by Rule 52's invocation of the notion of "sufficiency."

If the reviewing court is required to judge the "sufficiency" of the evidence supporting the trial court's findings of fact, it has necessarily been commissioned to consider closely all the evidence acting in that capacity.

It should therefore be obvious that the evidentiary underpinnings of the lower court's findings of fact must be scrutinized closely to see whether those underpinnings show the court to have committed clear error under Rule 52. *Anderson v. City of Bessemer City, North Carolina,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed. 2D 518 (1985) (""[a] finding is 'clearly erroneous' when **although there is evidence to support it**, the reviewing court **on the entire evidence** is left with the definite and firm conviction that a mistake has been committed.") (emphasis added), *citing United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *Id.* at 581, Powell, J., concurring (expressing concern that the Court's decision could be taken as an implied criticism of the lower court "for the very fact that it engaged in a comprehensive review of the entire record of this case," a criticism which could be taken as encouraging "overburdened Courts of Appeals simply to apply Rule 52(a) in a conclusory fashion, rather than to undertake the type of burdensome review that may be appropriate in some cases.").

The question that the reviewing courts should ask, then, is this: "Is the evidence taken on the record as a whole of such a character and weight, with "due" (which is to say, "some") deference given to the trial court in its decisions about credibility--those not contradicted or overwhelmed by the record taken as a whole--such that no error may clearly be predicated of its factual findings?"

And when, as in the instant case, the reviewing court

is asked to assess the standard of proof used by the lower court, it must ask if, whether independently of the trial court's invoked standard of proof, the proper standard has actually been employed, an inquiry by definition conducted de novo. *See* Pet. App. A, 13a-14a (de novo review appropriate for district court's application of legal standard).

To recapitulate: the deference accorded a district court decision under Rule 52 should take shape in relation only to witness credibility and should be given its scope by the modest modifier "due."

Since under Rule 52 the reviewing court must decide whether the evidence allows it to predicate clear error of the lower court, it must weigh, and test, and probe that evidence sufficiently to allow it to determine whether error is clearly present. *See, e.g., Allentown Mack Sales & Service, Inc. v. NLRB,* 83 F.3d 1483, (reversed and remanded after extensive review of record to determine if agency below met evidentiary demands despite "deferential" standard of review); *Board of the County Commissioners of Bryan County, Oklahoma v. Brown,* 520 U.S. 397 (1997) (high court reviews evidence extensively for sufficiency; vacated and remanded); *see also, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (reversed); *McCowan v. All Star Maintenance, Inc.*, 273 F.3d 917, 921 (10th Cir. 2001) (evaluating separate instances extricated from their overall context "robs the incidents of their cumulative effect").

On the other hand, if the question the appellate court has been asked to review concerns the correctness of the standard under which the lower court made its decision, as a question of law the review is conducted de novo.

The appellate court's Order and Judgment (Pet. App. A) is deficient in precisely the ways outlined above.

Although declaring that its review should be conducted de novo, the Tenth Circuit admitted repeatedly that it did not review the court below under that standard. In fact, it often did not review even under the clear error standard demanded by Rule 52, using what was in effect a substantial evidence standard instead. Under either head, these errors demand reversal.

B. Abuse of Discretion

A court abuses its discretion when it uses that discretion to the legal prejudice of a party with insufficient legal justification. *See, e.g., In re Wray*, 433 F.3d 376 (Fed. 4th Cir. 2005).

The decision of the lower court will be set aside under this standard if the reviewing court becomes convinced that there was "a clear error of judgment" on the part of that lower court in the way in which it accorded weight to "the relevant factors." *Lowry v. Long Island Rail Road Company*, 370 F.2d 911 (2nd Cir. 1966).

For this tribunal to overturn the reviewing court's Order and Judgment refusing to set aside the trial court's evidentiary decisions for abuse of discretion, it must itself review the individual facts of the case before the trial court to determine whether the appellate court refused to recognize that the lower court used its discretion to Petitioner's legal detriment without sufficient legal justification. *See, e.g., Beech Aircraft Corp v. Rainey*, 488 U.S. 153, 176, 109 S.Ct. 439, 102 L.Ed. 2D 145 (court abused discretion in restricting scope of cross-examination); *U.S. v. Abel,* 469 U.S. 45, 54-55, 105 S.Ct. 465, 470, 836 L.Ed. 2D 450 (no abuse of discretion in admitting evidence because it caused no undue prejudice).

Two trial court evidentiary decisions prejudiced Petitioner's prosecution of her case on the merits without sufficient legal justification or support and should therefore be reversed.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE TENTH CIRCUIT USED AN IMPROPER STANDARD TO TEST THE EVIDENTIARY BASIS FOR THE LOWER COURT 'S FINDINGS OF FACT

Petitioner repeatedly made the point in her Petition for Rehearing and for En Banc Review, requesting of the Tenth Circuit that it reconsider its Order and Judgment (Pet. App. A), that appellate review of the decision below had not been conducted under the proper standard. Petitioner's request was denied without comment. Pet. App. D, 84a.

Petitioner's argument was essentially that the Tenth Circuit panel, while ostensibly reviewing for plain error actually applied a substantial evidence standard. *Yzaguirre v Barnhart*, 2003 C10 262 (USCA10, 2003) (substantial evidence standard of review requires appellate court "deference" to lower court findings).

Of course, "deference" sounds very close to what is required of the clear error standard in many of the permutations that the clear error standard takes. *Elmore v. Capstan, Inc.*, 58 F.3d 525, 529-31 (10th Cir. 1995) (review under the clearly erroneous standard requires upholding "any determination falling within a 'broad range of permissible conclusions'"; with "two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous") (citations omitted).

Both standards also require that the record be reviewed to ensure that it supports the lower tribunal's findings. *See* 29 U.S.C. § 160(e) (factual findings of the Board conclusive "if supported by substantial evidence on the record considered as a whole"). See also the *Anderson* Court's admonition above that ""[a] finding is 'clearly erroneous' when...the reviewing court on the entire evidence

is left with the definite and firm conviction that a mistake has been committed." *Anderson,* 470 U.S. at 573.

Since both standards uphold the lower tribunal if the evidence is present in the record as a whole to support that tribunal's findings, the difference between them must lie elsewhere.

The key to that difference can be found in the phrase "if the evidence is present to support it."

What evidence?

In the case of the test for substantiality, "substantial" evidence.

In the case of the test for clear error, "sufficient" evidence.

In the former, the test is merely whether there is evidence present such as "**could** satisfy a reasonable factfinder." *Allentown,* 83 F.3d at 1483. In other words, it is a truly deferential standard. If the record in its entirety has **any** evidence that satisfies this minimum standard in support of each of the points at issue, no further inquiry is permitted.

In the case of "sufficient" evidence, however, the term itself at once alerts the attentive reader that more is required. The record is examined not for what evidence might satisfy the hypothetical reasonable person, but rather that "which [**actually**] satisfies the [**actual**] court" before which the argument is being made that the "requisite" facts exist. *Id.*

What is it concerning the requisite facts about which the court must be satisfied?

The court must be satisfied that each fact when viewed within the whole of the record—that is, the evidence taken together and in context--does not reveal that a mistake was made. So it is a deferential standard only in a remote sense. It necessarily conducts a search for the "weaknesses, implausibilities, inconsistencies, incoherencies, or

contradictions" outlined by the *Morgan* Court that may reveal the trial court to have been mistaken. *See Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997). In other words, it examines the countervailing evidence in a way disallowed by the search for substantiality.

If such countervailing evidence is found, it may be used under the clear error standard to overturn a judgment in a way that countervailing evidence may not be used once substantial evidence has been found under that less exacting standard.

What standard did the Tenth Circuit use in its review of the countervailing evidence in the instant case?

It consistently ignored any countervailing evidence, when it did not actually do violence to that evidence through the expedient of misanalysis and outright mischaracterization. *See* Pet. App. A, 13a-33a, wherein the trial evidence is examined in complete deference to the trial judge's view of that evidence.

In other words, the appellate panel used the least stringent standard of review to which the decision of a lower court may be subjected, substantial evidence, rather than clear error, especially when clear error is invigorated by the rigor it assumes when joined to a test for "sufficiency."

Petitioner will examine below the rule that requires in the instant case a standard even more rigorous than that of clear error modified by the notion of sufficiency. But in order to establish that, even if that stricter standard is not required, a standard higher than the one actually employed by the trial court is necessary, she will first review the appellate court's analysis to show that it was not conducted under the "clear error" standard, but rather a "substantial evidence" standard, which in itself calls for reversal.

A. The Lower Court's Standard of Proof

Petitioner's primary argument in the court below pointed to the trial court's litany that there was "no evidence" in support of Petitioner's case, and demonstrated that the mere reiteration of that phrase did not make it so. It is impossible to emphasize sufficiently the danger of the Tenth Circuit's lack of response to this argument, offering--as its appellate panel did--excuse after excuse for the miserably crafted, illogical, paralyzing posture adopted by the district court, choosing, as that lower court did, to write off argument after analytical argument with a cursory swish of its pen.

Petitioner's chief point is that the district court **chose to consider only direct evidence on certain crucial matters**, turning its back on volumes of circumstantial evidence, dismissing those volumes as having no evidentiary effect or value. Otherwise, the district court would not have emphasized repeatedly that Petitioner had no evidence concerning so many pivotal issues. If that court claimed that certain evidence did not exist, but the evidence demonstrably did exist, then the court was signaling its studied refusal to consider it.

The alternative is far worse, the one, in fact, offered implicitly by the appellate court: the district court was uttering gibberish. When the appellate court seeks to excuse the district court by saying in effect that it meant the contrary of what it actually said (Pet. App. A, 15a), it implicitly makes that argument.

While Petitioner argues in her briefs only against the first, more reasonable, of these alternatives, it should be obvious that either of them endangers the appellate process. If the first, trial courts will feel free to make up the rules as they go along. When they see that the evidence is leading to

an undesirable result, they can simply push great swathes of that evidence into the memory hole under the rubric of "no evidence," then find for the favored party on the basis of what is left.

While Petitioner does not suggest that this has been a conscious ploy on the part of the present trial court, even with the most benign of motives the result is the same. The refusal of a court to consider the competent evidence before it is reversible error. *See, e.g., Weeks v. Angelone*, 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) ("[T]his Court reversed a sentence of death because the trial judge had refused to consider mitigating evidence: '[I]t was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf.'"), *citing Eddings v. Oklahoma,* 455 U.S. 104, 114 (1982); *Mergentime Corporation v. Washington Metropolitan Area Transit Authority, et al.,* 166 F.3d 1257 (trial court refusal to consider argument reversible error); *Malone v. California State College, Stanislaus*, 988 F.2d 120 (9th Cir. 1993) (refusal of trial court to entertain argument on sufficiency of evidence requires remand); *Gilbert v. Sterrett*, 509 F.2d 1389, 1397-98 (trial court erroneous in declaration of "no evidence" when evidence can be found in the record).

Petitioner will focus below on but two examples of the many instances of this sort of reversible error which she asked the Tenth Circuit to consider.

If the second alternative—that the court is uttering gibberish--is the right one, on the other hand, it is at least as important that the practice be stopped. A trial judge's recitation of the facts should reflect what is actually in the record. *Ramey Construction Company, Inc., v. Apache Tribe of the Mescalero Reservation*, 616 F.2d 464 (10th Cir. 1980)

(appellate court unwilling to review findings if "unable to ascertain the legal theories under which the trial court was operating"); *Emerson Electric Co. v. Farmer*, 427 F.2d 1082 (5th Cir. 1970) ("contradictory findings and conclusions" reversible error).

Petitioner offered about twenty instances of the trial court's exclusion of circumstantial evidence through its use of the phrase "no evidence" or one of its variants. To this extensive list the Tenth Circuit replied merely that on certain points Petitioner "presented no competent evidence, direct or indirect, while on others she presented no persuasive evidence either because the witness was not credible or less credible than another witness, the testimony was irrelevant, immaterial, speculative, or nonprobative, or the testimony conflicted with other testimony that the court considered persuasive." Pet. App. A, 15a.

No matter which of the alternative explanations for the lower court's inaction could be right, the reviewing court is wrong. It has not met Petitioner's argument--that the lower court used the wrong standard--with the right standard of its own. It has not dealt with the lower court's refusal to review the evidence by pointing to how and why it determines that "no evidence" **really** means "incompetent," "conflicting," "unpersuasive," or "irrelevant" evidence. This is hardly the probing that Petitioner has shown above is required to test the lower court for sufficiency. Much less is it the de novo review which the court admitted it was obliged to conduct. Pet. App. A, 15a.

How can the reviewing court determine that the court below did not clearly commit error if it refuses to take that lower court at its own word, merely declaring that "[i]t is clear" that the words it puts into the mouth of the lower court are as the reviewing court says they are! Pet. App. A, 15a.

What is clear instead is that the record reveals that once the trial court announced that certain evidence did not exist, it brushed it conveniently into the memory hole.

B. Lila Lawrence and the No-Evidence Syndrome

The district court said that there was "no evidence" that Lila Lawrence was lying. Pet. App. B, 44a. If we take the court at its word, and therefore know that it did not include in its review of the record any evidence that Lila Lawrence might have been lying, Pet. App. B, 39a-42a, 44a, then we know that it excluded the following from its consideration of her truthfulness.

First, the irregularities in her investigation of Petitioner's purported wrongdoing, which included her personal collection of statements prejudicial to Petitioner, many of them having nothing to do with that purported wrongdoing, and many of which contradicted each other; her use of those statements to Petitioner's detriment while ignoring and hiding the available exculpatory evidence and the contradictory nature of the evidence she chose to submit; her finally being forced to submit Petitioner's exculpatory evidence in spite of her reluctance to do so; her declaration that the contradictory statements were reliable and contained the witnesses' "complete understanding" of the events surrounding Petitioner's removal as an employee, and that they had been collected from all the eyewitnesses (none of which proved true); her immediate impulse and decision to destroy evidence tending to exonerate Petitioner, and her failure to guard the chain of custody for the remaining evidence; her reliance upon a witness whom she claimed to consider extremely reliable, but who had—precisely during the time that Lawrence was relying on her--identified evidence that Lawrence chose to destroy on the spot because of its falsity; each one of which actions tend to cast serious doubt upon Lawrence's veracity and reliability as a witness.

Next, Lawrence's failure to investigate whether

Schulte would even have benefited from her purported acts of wrongdoing, essential to determine whether she had a motive for carrying them out. Such an investigation would have been easily conducted, according to witnesses whose interests were contrary to those of Petitioner, testifying as they did on behalf of the post office.

Next, Lawrence's conflicting testimony as to why she had improperly filled out an application for Petitioner to Petitioner's disadvantage, and her attempt to explain away the fact that she had no trouble filling out precisely the same application properly for another employee at the same time.

Next, Lawrence's failure to adequately explain her admitted misrepresentations to the EEO concerning the reasons for Petitioner's discharge.

Finally, Lawrence's failure to utter a single word during three entire years of litigation concerning crucial aspects of her own participation in the events of Petitioner's removal, during which three year period Lawrence testified repeatedly about that removal. Having kept the facts closely to herself for this entire length of time, on the day of trial, in a sudden burst of memory she recollected that she had in fact been an eyewitness to the critical events herself and could offer fresh testimony about them on the stand!

Now, since the issue here is whether or not there was any evidence in the record that would show that Ms. Lawrence was being less than honest, the reviewing court was under an obligation to submit this set of circumstances to a withering eye to ensure that the court below did not commit clear error in its assertion that there was "no evidence" that her testimony suffered from that unhappy impediment.

Withering is not the modifier that leaps to mind once the reviewing court's analysis is itself analyzed, whether that court was required to review the evidence as part of the record as a whole for its sufficiency in order to exclude clear error, or under a de novo standard. The review it conducted

is in fact an obvious effort at minimalization. It mentions only four of these facts, almost in passing, and then declares them to be "minor," "irrelevant," and such as do not "**exclusively** suggest age bias" (emphasis added), with no explanation as to why. Pet. App. A, 25a-26a.

If this be not a review for mere substantial evidence, or possibly for something less than substantial evidence, then it is difficult to conceive a review that is.

Whether or not Lawrence was acting disingenuously in the conduct outlined above bears strongly on whether or not she was being dishonest in saying that she was not motivated by Petitioner's age when she acted to remove Petitioner from the USPS. Since Lawrence was a key player in Petitioner's removal, this was a critical matter for both courts to consider. Neither court did so.

Disparate treatment may be shown by indirect or circumstantial evidence, *Reeves v. Sanderson Plumbing Products, Co.*, 530 U.S. 133 (2000). Since direct evidence is rare in discrimination cases, *Huff v. UARCO, Inc.*, 122 F.3d 374, 380 (7th Cir. 1997), Plaintiffs must typically rely on indirect evidence. Evidence that an explanation is "unworthy of credence" is "one form of circumstantial evidence... probative of intentional discrimination." *Id.* at 147. Indirect evidence is regarded as the evidentiary equal to direct evidence not only because it is "sufficient," but because it "may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, n. 17 (1957).

It is unfortunate that the page limitations that Petitioner is working within do not permit a more detailed exposure of the manner in which both of the courts below repeatedly and studiously avoided their duty to apply the correct standard to the issues. She will offer but one more example before turning to the court's own admission that it used the wrong standard in its review of this case.

C. Petitioner and the No-Evidence Syndrome

According to the district court, Petitioner admitted that she had "no evidence" of discrimination in her own case.

Not only is this absurd on its face since Petitioner was in the midst of a four day trial when she said it, with witness after witness offering testimonial evidence on her behalf, but it was error on the part of the trial court to ascribe this legal conclusion to a laywitness. All that Petitioner can be deemed to have admitted, at least all that logic and reasonable jurisprudence permit, is that she had no smoking gun in hand.

Petitioner asks the instant Court to take judicial notice that as a layperson she was not qualified to draw the legal conclusion the district court put into her mouth, and furthermore that this specific legal conclusion is an absurdity of the first water. Had Petitioner meant what the district court said she meant, she would not have 1) gotten by a motion for summary judgment, 2) spent four grueling days putting on witness after witness and introducing hundreds of pages of documentary evidence before a largely unsympathetic court, and 3) survived Respondent's motion for judgment as a matter of law.

The Tenth Circuit panel said of Petitioner's evaluation of the trial court's declaration that she had "admitted" during the course of the trial that she had "no evidence" of age bias (Pet. App. A, 31a), that it was but another instance of Petitioner's "flawed" characterization of the trial court's repeated use of that concept. Pet. App A, 15a.

However, in rejecting Petitioner's "flawed" evaluation, saying that the phrase "no evidence" actually meant instead "no competent evidence...no persuasive evidence...irrelevant, immaterial, speculative, or nonprobative [evidence]," or "conflict[ing]testimony," (Pet. App. A, 15a), nowhere among these alternative meanings does the Tenth Circuit produce one responsive to Petitioner's **actual** evaluation of this trial court assertion, namely, that it

puts a legal conclusion in the mouth of a layperson.

Instead, using a diversionary tactic, the review panel asserts that it can find "nothing improper" in "the district court's accurate finding as to Schulte's express agreement that she had not presented any 'incidents' or other 'anecdotal evidence' that showed Lawrence was motivated by age bias." Pet. App. A, 31a.

But Schulte never made any connection between these two propositions, on the one hand that she had no smoking gun evidence and on the other that she had no anecdotal evidence. The district court never explains how a failure to offer a mere list of "anecdotes" translates into a failure to offer any evidence. And to the extent that Petitioner's evidence on this score might have been lacking, the appellate panel fails to take into account that the trial court was itself responsible for creating any such lack.

First, the trial court did not permit Petitioner to discover evidence that would have shown that the USPS engaged in a pattern and practice of age discrimination, which would have allowed her to offer a suitable substitute for anecdote. Petitioner will deal with this matter below.

Next, it failed to permit Petitioner to develop her case at trial with evidence showing that this pattern and practice was alive and well when Petitioner was removed from the USPS. She will deal with this notion below as well.

Appellate review, then, was erroneous, first, because it deferred entirely to the trial court's view of the evidence.

Second, and more seriously (and contradictorily!), it did not let the trial court speak for itself.

The trial court said repeatedly that it found for Defendant USPS because there was **no** evidence to sustain Petitioner's position. Pet. App. A, 14a-15a. If the trial court, to which such deference was accorded otherwise, did not mean "no evidence," it had ample opportunity--having taken many months to reach its decision--to clarify this point.

But when deference was not enough to give the trial court what it wanted, the review panel decided to go that extra mile and substitute its own clever notions for those of the lower court. This is precisely the sort of egregious sleight of hand that cannot properly survive under a clear error standard, with or without "sufficiency" to give it added rigor, requiring reversal by this Court.

D. Appellate Admission of Its Use of an Improper Standard

The Tenth Circuit panel stated that since the ruling at issue was based "only on [Petitioner's] failure to present any direct evidence of discrimination when in fact, according to her, she presented a large quantity of indirect evidence that supported her claims,'" she was "in effect contend[ing] that the district court committed a legal error." Pet. App. A, 15a.

Petitioner agrees.

The panel concluded, "We review the district court's application of legal standards **de novo**," *citing Sinajini v. Bd. of Educ.*, 233 F.3d 1236, 1240 (10th Cir. 2002). Id. (emphasis added).

Petitioner agrees as well with this assessment.

Having given theoretical utterance to the law in terms as succinct as it is possible for a mind trained in legal niceties to produce, the court immediately produced a collision with itself in mid-air, as the following review makes exceedingly clear (all emphases added).

About the testimony of Dr. Stone the court said, "We conclude that the district court's findings of fact as to Stone **are not clearly erroneous**." Pet. App. A, 18a.

About the testimony of Petitioner herself the court said, "The district court disagreed with Schulte's evaluation of the evidence, and we see **no clear error** in that disagreement." Pet. App. A, 19a.

About Paula Quinn, the appellate court offered its opinion that it saw "**no clear error** in the district court's

treatment of Quinn's testimony as it relates to Cameron." Pet. App. A, 21a.

About Lynne Jones, the appellate court concluded that there was "**no clear error** in the district court's conclusion" that her testimony was not persuasive. Pet. App. A, 22a.

About discrepancies in Jeffrey Dalton's testimony the court said that "The district court's resolution of these two plausible versions of events **cannot be clearly erroneous**." Pet. App. A, 25a.

About Lila Lawrence the reviewing court said that "[e]ven if Schulte is correct, the alleged fabrication does not exclusively suggest age bias such that we might see **clear error** in the trial court's conclusion that Lawrence had a good-faith belief that Schulte had recirculated the mail." Pet. App. A, 26a.

About testimony concerning Susan Beck, the court said that "it supports one of two plausible findings, and the district court's choice between them **cannot be clearly erroneous**." Pet. App. A, 27a. Moreover, "Inconsistencies that may be attributable to differences in employer representatives or human error are of insufficient probative value to render the district court's findings in this case **clearly erroneous**." Pet. App. A, 28a.

About Jackie Bouffard, the court said that "[n]othing in her testimony suggests that the district court's factual finding was **clearly erroneous**." Pet. App. A, 29a.

About Pam Cameron credibility issues were resolved with "**no clear error**." Pet. App. A, 31a.

In every discussion, in fact, of every witness, the appellate court declared that it was using a clear error standard, although it had just admitted that its job was to conduct a de novo review. Of course, we have seen above that it actually employed an even more deferential standard than the already deferential one it declared itself to be using.

This is error on its face, and demands reversal.

Pullman Standard v. Swint, 456 U.S. 273, 273-74, 102 S.Ct. 1781, 72 L.Ed. 66 (1982) (different standard of review results in a different outcome) (citation omitted); *Salve Regina College v Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("When de novo review is compelled, no form of appellate deference is acceptable"; in review for clear error, panel would affirm; under de novo standard, panel would reverse) (citation omitted); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) ("Because the Court of Appeals applied a less demanding standard in this case, we vacate the judgment and remand the case for further proceedings consistent with this opinion.")

III. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE TENTH CIRCUIT IMPROPERLY DENIED PETITIONER RELIEF FROM THE LOWER COURT'S EVIDENTIARY RULINGS

The district court erred in making two evidentiary decisions without sufficient legal basis, prejudicing Petitioner in the prosecution of her case on the merits.

First, the trial court did not permit Petitioner to discover statistical evidence that would have shown that the USPS engaged in a pattern and practice of age discrimination.

To the extent that the lower courts complained of Petitioner's failure to produce evidence in support of her case (recall its litany of "no evidence"), trial court permission to discover pattern and practice evidence would have more than satisfied the lack. It would have provided the finder of fact with the key to Petitioner's theory of the case, namely that the adverse employment actions taken against her were the result of an unwritten USPS policy to rid itself of older workers.

Next, the trial court failed to permit Petitioner to develop evidence at trial showing that this policy was in place when Lila Lawrence, acting as surrogate for the postmaster, removed Petitioner.

Essential to Petitioner's theory of the case was that Susan Beck, the postmaster, was merely carrying out this unwritten policy by arranging to have Petitioner removed from her position.

A. The Lower Courts, in Ruling Against Petitioner's Request for Statistical Evidence, Denied Her an Essential Piece of the Mosaic

To successfully request a reversal in an evidentiary matter, a party "must make a clear showing she suffered prejudice, and the ruling...affected her substantial rights." *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 773 (10th Cir. 1999) (citation omitted).

Petitioner had a constitutional right to a trial on the merits for her age discrimination claims. She was seriously hampered in her efforts to bring critical evidence that bore on her claims to the attention of the finder of fact. This is by definition prejudice. She hopes that the irony of this prejudice does not escape the attention of the Court. Her good faith efforts to obtain the evidence she needed to prove her case under the liberalized Rules of Civil Procedure were stonewalled at every turn by an unnecessarily technical straitjacketing of the rules. When she had to proceed to trial without that evidence, those who withheld the evidence did not scruple to point out repeatedly that it was lacking.

Either this Court should find that Petitioner is entitled to proceed before a factfinder under a different standard so that she has a fighting chance with the evidence she already has, or she should be given access to the evidence that gives her a fighting chance before she proceeds, or--if justice be a consideration--both.

First, it bears emphasis that the district court's repeated refrain that Petitioner had "no evidence"; its minimizing of the testimony of her expert witness for lack of

"empirical data," Pet. App. A, 17a; Pet. App. B, 55a; and its permission for her to go forward with her case on a theory of pattern and practice, Pet. App. A, 21a-22a, all make it clear that the lack of the statistical evidence she sought prejudiced her severely in the presentation of her case on the merits.

And she sought this evidence repeatedly. Numbers 3-8 of her First Set of Interrogatories sought, for example, the identity and ages of Tulsa district applicants and selectees for the Associate Supervisor Program, Detail Bank positions, and Officer-in-Charge positions. In Request for Production No. 21, Schulte sought the personnel files of all USPS personnel who were awarded positions for which Schulte had applied and been rejected during 2000 through 2002, in part to discover their ages.

At a hearing in June, 2004, Schulte argued that she needed the statistics at issue to show a pattern or practice of age discrimination and that, especially in view of the unavailability of much of the other evidence she sought, statistical age based data was critical to her case.

The record therefore establishes Petitioner's persistence in pursuing age-related discovery in order to develop her case. Certainly by June, 2004, far in advance of the October, 2004, hearing on Petitioner's motion to reopen discovery, the post office understood Petitioner was seeking statistical information sufficiently to argue that it did not want to "create reports based on 'statistics concerning the age of Defendant's work force.'" Pet. App. A, 6a.

First, it is clear, then, that Petitioner suffered enormous – in fact, fatal--legal prejudice from having her timely and diligently pursued requests denied, but that Respondent has yet to identify a single one of its legal interests that would have been impacted negatively by a

decision favorable to Petitioner on this discovery issue. Second, it is clear that an erroneous discovery ruling that affects the substantial rights of the parties invites reversal. *Frontier Ref., Inc. v. Gorman-Rupp Co., Inc.* , 136 F.3d 695, 705 (10th Cir. 1998).

District court discovery rulings are reviewed for abuse of discretion. *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995). If the appellate court sees "that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances," it should reverse. *Nieto v. Kapoor*, 268 F.3d 1208, 1221 (10th Cir. 2001) (internal quotation marks omitted). While district courts have a great deal of leeway in managing their own courtrooms, that leeway is "not unbridled." *Nepsk Inc. v. Town of Houlton* 283 F.3d 1 (1st Cir. 2002), *citing United States v. Roberts*, 978 F.2d 17, 20 (1st Cir. 1992).

It is surely an error of judgment if in the light of legal prejudice to one party and none to another, a trial court makes a decision based substantially upon its choice of a set of "magic words." The trial court compared Petitioner's written discovery requests for "the makeup of the USPS workforce according to age," with her later explanation that this would provide her with "statistical data of [USPS] promotion practices," and finding that they did "not square" with each other, denied their production. Pet. App. C, 81a.

It is so obvious that it bears only the briefest mention that in an age discrimination case that includes a claim for failure to promote, the purpose of a request for the makeup of a workforce according to age is to provide the requesting party with statistical data to show that the party was denied promotion because of age.

The trial court's "magic words" solution to what it

perceives as something other than a straightforward discovery dispute is surely nit-picking of the highest order. Petitioner would ask that this Court declare that nit-picking of the highest order is by definition "beyond the bounds of permissible choice" in a lawsuit to vindicate important civil rights, and therefore an abuse of discretion.

On alternate grounds, the trial court denied Petitioner's requests because she did not meet and confer with opposing counsel before filing her motion to re-open discovery.

With respect to a motion to reopen, the relevant factors include: 1) proximity of the trial date, 2) whether it is opposed, 3) prejudice to the non-moving party, 4) the moving party's diligence, 5) the need for additional discovery, and 6) relevance. *Smith v. United States*, 834 F.2d 166, 169 (10th Cir. 1987).

All of these factors but number 2 weigh heavily in Petitioner's favor. We have already covered numbers 3, 4, 5, and 6. As to number 1, the court had just extended the trial date several months into the future.

The trial court later recharacterized her motion to reopen discovery as one to compel discovery, but Petitioner had no way of knowing at the time that she filed her motion to reopen that what she had filed in good faith with a particular object in view would work to her prejudice on a technicality.

Petitioner believes that this fits within the parameters of excusable neglect. "[A]t bottom [an excusable neglect determination is] an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 385, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). The

factors for the consideration of the court are "[1] the danger of prejudice to the [nonmoving party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." Id.

This is essentially a shorter version of the list of factors the court considers when deciding on a motion to reopen discovery, outlined above. We have already seen that they weigh heavily in favor of Petitioner. About Number 3, particularly relevant here, the instant Court has this to say: "Congress plainly contemplated that the courts would be permitted to [invoke excusable neglect because of] inadvertence, mistake, or carelessness, not just [because of] intervening circumstances beyond the party's control. This flexible understanding comports with the ordinary meaning of 'neglect.'" Id.

The appellate panel ignored Petitioner's clear proof that it is not only the Illinois' courts that have endorsed the concept that the law will not require one to engage in a "clearly useless" act, but the Tenth Circuit as well. *McGraw v. Prudential Ins. Co.*, 137 F.3d 1253, 1263 (10th Cir. 1998). It also ignored the fact that whether or not to reopen discovery is not amenable to face to face resolution.

But if Petitioner thought she was filing a motion to reopen, those arguments show that she had a good faith basis to act as she did. Because the discovery deadline had long since passed, Petitioner believed herself to be filing just such a motion. *Nepsk,* 283 F.3d at fn. 6 (party's argument that failure to comply with local meet and confer rule caused by excusable neglect "persuasive").

She understandably did not take the same precautions

she would have taken had she believed herself to be filing a motion to compel. But, in any case, the Tenth Circuit did not apply what should have been controlling law. If it was not persuaded to enter judgment in Petitioner's favor on the bases argued above, it should have remanded with instructions to reopen discovery for the limited purpose of allowing Petitioner to discover the statistical data she sought. *Hartnett v. O'Rourke,* 69 Fed. Appx. 52 (10th Cir., 2003) (although Appellants neither preserved the issue of discovery for appeal nor complied with the local rule concerning the out-of-court resolution of discovery disputes, the documents they sought "could be quite significant"; therefore remanded to "allow further opportunity for discovery").

Mistaken good faith failure to comply with a local rule should be treated as excusable neglect when a holding to the contrary will have the drastic effect of fatally prejudicing the party whose failure occasioned the holding.

B. The Lower Court, in Ruling Against Petitioner's Attempt to Introduce Testimony at Trial, Denied Her an Essential Piece of the Mosaic

The standard of review for evidentiary rulings at trial is that of abuse of discretion. Having already outlined the elements for that standard above, we will not repeat them here, but such a review is "setting specific," asking if "the district court correctly weighed appropriate factors." *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404 (C.A.10 (Colo.), 1991), *citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 266, 70 L.Ed.2d 419 (1981).

Applying that notion to the instant case, the relevant facts are as follows. First, the appellate panel granted that Petitioner had made an offer of proof at trial. Pet. App. A, 12a. It nevertheless objected that Petitioner's argument

briefed in support of that offer of proof fell only "under the same general category" as her argument at trial. Id. Apparently, the appellate court also has a "magic words" fixation, believing that it can require of an objecting party only words that it endorses in order to permit an objection.

The trial court repeatedly sustained opposing counsel's objections to Petitioner's line of questioning, a line of questioning intended to show that her station manager "did not want Petitioner removed [from her supervisory position] because she did a good job for him **but that 'he had to have that happen.'**" Id. (emphasis added). The appellate court characterized this evidence as an expression merely of the opinion of Petitioner's supervisor as to her work performance "and the fact that he did not want her removed." Id.

But this explanation does not suffice. If Petitioner's supervisor did not want to demote her, but nevertheless "had to have that happen," precisely the line that Petitioner was pursuing at trial, Petitioner was entitled to find out how and why "he had to have that happen."

It is Petitioner's theory of her case that it was Susan Beck, the postmaster at the time, who had instructed supervisor Steve Lundak to remove Petitioner from this management track position. As a member of the team that denied Petitioner yet another management track position on another occasion, and as someone admittedly consulted in Petitioner's dismissal, Beck was a key player in dashing Petitioner's dreams of advancement within the postal service.

This additional testimony would have shown clearly that the USPS through Postmaster Beck targeted Petitioner, derailing her from her management goals.

Yet both trial and appellate courts refused to see the relevance, and the fundamental unfairness--not to mention the legally irrational nature--of the decision that kept Petitioner from pursuing this crucial line of evidence.

The appellate panel accepted Petitioner's position that

she should have been permitted to pursue the Susan Beck angle. Pet. App. A, 13a. It then contradictorily based its decision not to permit Petitioner to pursue that angle on the gratuitous notion that Petitioner "made no showing that Beck's role in [the removal from her position at issue by supervisor Lundak] was motivated by age bias." Id.

If Petitioner was prohibited from pursuing this line of questioning from the outset, how could she have shown anything about it at all?

To the extent that the anticipated outcome of this line of questioning, together with all the other excluded, omitted, and mischaracterized pieces of the mosaic (see generally all the argument above) show Respondent's motive for the adverse employment actions it took against Petitioner to be other than its stated reason, to that extent an inference of age discrimination may be made. *Reeves v. Sanderson Plumbing Products, Co.*, 530 U.S. 133 (2000).

This is the sort of evidence that the instant Court has found to be "the evidentiary equal to direct evidence not only because it is 'sufficient,' but because it "may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, n. 17 (1957). *See also Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) ("weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" may all show that employer's reasons are unworthy of belief). Since direct evidence is rare in discrimination cases, *Huff v. UARCO, Inc.*, 122 F.3d 374, 380 (7th Cir. 1997), Plaintiffs must typically rely on indirect evidence.

The appellate panel grants that Schulte had a right to pursue the questioning of her supervisor as to the facts surrounding her removal from the position at issue. She has shown the panel's only remaining reason to deny her relief on this matter (that she has not drawn a direct connection between her removal from that position and her age) to be

without foundation. The District Court's denial of her right to use the evidence of her removal for the purpose for which she proposed to use it at trial should therefore be reversed as an abuse of discretion. *See, e.g., Beech Aircraft Corporation v. Rainey Beech Aerospace Services, Inc v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988), (district court abused discretion by restricting scope of cross-examination); *Brooks v. Barnhart*, 78 Fed.Appx. 52 (10th Cir. 2003) (district court abused discretion in refusing to permit witness testimony); *Jodoin v. Toyota Motor Corp.*, (1st Cir. 2002) (evidence deemed irrelevant by trial court found to be relevant by reviewing court, which therefore found both that the "district court abused its discretion...and that this error was not harmless").

While this appeal was pending before the Tenth Circuit, Petitioner sent a Citation of Supplemental Authority to the review panel, pursuant to FRAP 28(j), notifying it of a Tenth Circuit case that had just been decided bearing directly on the issues in the instant case. *Mendelsohn v. Sprint/United Management Company*, 466 F.3d 1223, 1228 (10th Cir. 2006) This newly decided case enunciated principles which should have been considered by the review panel as binding upon its review. *Mendelsohn* made the point that, as a general matter, an "evidentiary ruling is entitled to deference...But the court's discretion over evidentiary matters should not unfairly prevent a plaintiff a full opportunity to present her case." Id.

Speaking of the specific type of evidence the plaintiff in that case sought to introduce, the court characterized it as "certainly not conclusive evidence of age discrimination itself, but...surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation." Id. For this reason, "the evidentiary exclusion deprived Mendelsohn of a full opportunity to present her case to the jury." Id. The Tenth

Circuit concluded that "the district court abused its discretion in excluding the evidence," reversing and remanding. Id.

While in principle this case is about as much on point as a case can get, the panel in the instant case declared it to be "unpersuasive." Petitioner asks that this Court declare it persuasive, both in principle and in its applicability to the case at bar, and reverse the Tenth Circuit accordingly.

CONCLUSION

Petitioner respectfully prays the Court grant a writ of certiorari in order to entertain the further merits of her position.

Respectfully submitted,
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APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JANUARY 26, 2007

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 05-5209
(D.C. No. 03-CV-361-K (M))
(N.D. Okla.)

KAREN K. SCHULTE,

Plaintiff-Appellant,

v.

JOHN E. POTTER, Postmaster General, USPS,

Defendant-Appellee.

Before **HENRY**, **ANDERSON**, and **McCONNELL**, Circuit Judges.

ORDER AND JUDGMENT*

After a bench trial in this age discrimination suit, the district court entered judgment in favor of defendant John

* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Appendix A

E. Potter, Postmaster General of the United States Postal Service (USPS or Postal Service). Plaintiff Karen K. Schulte appeals. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

Background[1]

Schulte was born on June 9, 1941, and has worked for the USPS since 1994, primarily as a rural route carrier. According to her testimony, she applied for twenty-five supervisory positions over a thirty-eight month period. Three of those positions are particularly relevant to our discussion. In July 2000, when Schulte was fifty-nine, she applied for a promotion to a supervisory position through the Postal Service's Associate Supervisor Program (ASP). In the ASP selection process, a committee of postal officials reviews applications in which the identity, age, and certain other identifying characteristics of the applicants are redacted. In addition, the application contains a section referred to as "Knowledge, Skills, and Abilities," or "KSAs," in which applicants provide narrative responses concerning their achievements in six different areas such as leadership and decision making. Applicants whose KSA answers the committee deems adequate move on to an interview.

The position for which Schulte applied in 2000 was in processing and distribution, involving work on the "plant" side of the USPS, which concerns the behind-the-scenes movement of the mail. Schulte's KSAs were deemed adequate and she was interviewed, but she was not selected

1. The background facts are drawn largely from the district court's written findings of fact and conclusions of law.

for the position. She initiated a claim of gender discrimination through the Postal Service's Equal Employment Opportunity (EEO) process. The parties entered into a settlement agreement by which the Postal Service offered Schulte a temporary supervisory position (204-B position) in early 2001. Her tenure in that position ended in November 2001, and she returned to working as a rural route carrier.

In March 2002, Schulte, who was then sixty years old, applied for another ASP position, this time in customer service. An entirely different committee composed of Susan Beck, the postmaster of Tulsa, George Frame, the postmaster of Oklahoma City, Elizabeth Inman, then postmaster of Muskogee, and Jacqueline Bouffard, then manager of training, conducted the hiring process. Schulte was notified in June 2002 that she was not selected for an interview because her KSA answers were deficient, in particular her decision-making KSA.

Meanwhile, on March 5, 2002, Schulte was accused of recirculating mail during a mail count at the Chimney Hills Postal Station in Tulsa, Oklahoma. To understand this accusation, some background is necessary. The pay of a rural route carrier such as Schulte is based in part on how much mail she delivers. To make that determination, the USPS periodically counts the actual number of pieces of mail that are distributed, or "thrown," to a carrier's route, or "scheme." Mail that is thrown to the wrong scheme is referred to as a "misthrow." When a carrier finds a misthrow in her "case," she is supposed to bring it to the "misthrow case" for redistribution by the clerks through the "hot case." During a mail count, a carrier is supposed to inform the person

counting the mail if they receive a misthrow that was counted. But if, as alleged here, a carrier places into the misthrow case properly sorted mail that has already been counted and does not tell the counter, it would be counted again when it is thrown back to that carrier's scheme, thereby inflating the number of pieces of mail that are counted and increasing her annual salary. Fifteen or sixteen extra pieces of mail can inflate an annual salary by as much as $1,600.

With this understanding we may turn to the events of March 5, 2002. On that day, Pam Cameron, a USPS clerk who had developed familiarity with Schulte's scheme over a twenty-year period, was sorting mail to the carriers at Chimney Hills. Cameron noticed that some misthrows were coming through more than *706 once, even after she had paid particular attention to sorting the mail to the correct scheme through the hot case. She marked those pieces with a small "x" and sorted them to the correct route only to have them come back again through the misthrow case. Cameron observed Schulte return the marked mail to the misthrow case at least once and concluded that Schulte must be taking it from the hot case and placing it in the misthrow case.

Cameron brought this to the attention of Schulte's supervisor, Lila Lawrence. Lawrence confronted Schulte with the marked mail and informed her of the nature of the accusation. Schulte acknowledged that some of the marked mail (approximately thirteen pieces) belonged to her scheme but denied the charge. Lawrence excluded several pieces of mail Schulte claimed did not belong to her scheme and conducted an investigation, after which she submitted a report to a USPS labor relations specialist, Jeffrey Dalton,

recommending termination. Schulte filed a union grievance that went to arbitration, and Dalton represented the USPS. The arbitrator found that Schulte had recirculated mail but imposed a twenty-two month unpaid suspension rather than termination.

Schulte also filed an EEO complaint of discrimination with the Postal Service. Initially she alleged only retaliation for an earlier EEO filing, not age discrimination. She later amended her EEO complaint to include a claim of age discrimination. Obtaining no relief, Schulte filed the action underlying this appeal. Some of her claims were dismissed during pretrial proceedings, including her claim that the denial of her 2000 ASP application and her removal from the 204-B position were because of her age and in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (ADEA). Two of her other ADEA claims, those based on the proposed termination and resultant discipline for recirculating mail and on the denial of her 2002 ASP application, proceeded to a four-day bench trial. After trial, the district court issued thirty-one pages of detailed findings of fact and conclusions of law and entered judgment in favor of the USPS on both of Schulte's claims. This appeal followed.

Analysis

Schulte's statement of the issues presented on appeal is somewhat unclear. As we see it, she raises three issues: (1) the district court erred in denying one of her discovery motions; (2) the district court erred by excluding certain

evidence at trial; and (3) the district court did not properly consider certain evidence at trial. We address each point in turn.

1. Discovery error

Schulte propounded two requests for the production of documents that are at issue, Request Nos. 44 and 45, that in essence demanded the production of documents showing the makeup of the USPS workforce according to age for the previous ten years both nationally and in the Oklahoma and/or Tulsa region. *See* Aplt. App., Vol. I at 306. The USPS objected on overbreadth and relevance grounds and also claimed that it did not have any responsive documents and would have to write and install a new computer program to extract the information from its computerized databases. Schulte filed a motion to compel, which was her second in the case (Second Motion to Compel). A magistrate judge held a hearing and, on July 2, 2004, issued a written order denying the motion because there were "no responsive documents in existence," and stating that he would not require the USPS to create reports based on "statistics concerning the age of Defendant's work force." *Id.* at 230. In reaching his decision on the merits, the magistrate judge excused Schulte's counsel's "failure to confer in good faith" prior to filing the motion, a requirement under the court's local rule, LCvR 37.1. *Id.* at 226-27.

Schulte did not file any objections to the magistrate judge's order with the district court. Instead, on September 29, 2004, less than three months before the scheduled trial date, she filed a motion styled as a motion to reopen discovery

and strike all scheduled dates. The motion was based on allegedly newfound "evidence that calls into question the veracity of the discovery answers of Defendant USPS . . . concerning the availability of . . . statistical data [of its promotion practices]." *Id.* at 231. The new evidence was an affidavit from a USPS employee, Gus Reinolds, who claimed to be familiar with USPS computer systems and who averred that those systems contained data about the age of promoted employees. In the motion, Schulte asked the district court to "reopen discovery for the limited purpose of pursuing the statistical data the availability of which she has apparently been misinformed by Defendant USPS." *Id.* at 233.

The magistrate judge held a hearing at which Schulte presented two witnesses, Reinolds and F. Bennett Callicoat, an attorney with computer database experience who testified that databases ordinarily can be queried quickly and easily, without writing a new program, in order to extract information of the type Schulte sought, namely, the age of employees when they were promoted. Callicoat, however, had no first-hand knowledge of the USPS's databases.

The magistrate judge treated the motion as one to compel rather than one to reopen discovery and denied it on two alternate grounds, the first being Schulte's counsel's failure to comply with the meet-and-confer requirements of Fed.R.Civ.P. 37(a)(2)(B)[2] and LCvR

2. Federal Rule of Civil Procedure 37(a)(2)(B) requires any motion to compel discovery to "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action."

37.1.[3] In reaching this decision, the magistrate judge specifically noted that it was not the first time Schulte's counsel had failed to comply with these rules, Aplt.App., Vol. I at 304,[4] and he rejected the futility argument Schulte's counsel had presented at the hearing because LCvR 37.1 did not list futility as an exception, *id.* at 305.

3. At the time of the magistrate judge's decision in November 2004, LCvR 37.1A. provided as follows:

> Regarding all motions relating to discovery pursuant to Rules 26 through 37, Federal Rules of Civil Procedure, the court will refuse to hear any such motion, unless counsel for movant first advises the court in writing that the lawyers have personally met and conferred in good faith, but that, after a sincere attempt to resolve differences has been made, they have been unable to reach an accord. However, no personal conference shall be required where the movant's counsel represents to the court in writing that counsel have conferred by telephone and the distance between counsels' offices renders a personal conference not feasible. An exchange of correspondence alone does not satisfy this requirement.

See Aplee. Supp.App. at 81. The rule also listed two exceptions not relevant here. The rule was amended as of March 2, 2005, but we apply the rule in effect at the time the magistrate judge rendered his decision. *See United States v. 51 Pieces of Real Property*, 17 F.3d 1306, 1310 n. 6 (10th Cir.1994) (applying procedural rule in effect at time of relevant event in district court rather than amended version).

4. The magistrate judge also noted that Schulte had failed to comply with LCvR 7.1E, which extends the meet-and-confer requirement to all nondispositive motions. However, it does not appear the magistrate judge's first basis for denying Schulte's motion was grounded in that rule, so we need not consider it.

Alternately, the magistrate judge denied Schulte's motion on the merits. He compared the language of the written requests seeking documents pertaining to " *the makeup of the USPS's workforce* according to age" with Schulte's contention that she was seeking "statistical data of [USPS] *promotion practices*," *id.* at 307, and concluded that Schulte's "current motion seeks to rewrite Requests 44 and 45 to obtain information that was not previously requested," *id.* at 309. The magistrate judge declined to "accept a broad construction of [Schulte's] inartfully drafted discovery requests," noting that she had "more than adequate time to develop her case, but has not been diligent in doing so. She has repeatedly failed to follow Court rules, has not properly sought discovery of the information she now seeks, and has offered only speculation that the information she now seeks would assist her case." *Id.* at 310. The magistrate judge also stated that Reinolds's affidavit presented no new information because the court, in its ruling on Schulte's Second Motion to Compel, had previously acknowledged the existence of "age-related data, but ruled that it would not require [the USPS] to *create* reports to respond to Request Nos. 44 and 45." *Id.* at 309. Schulte filed a motion asking the district court to review the magistrate judge's order, which the district court denied.

As an initial matter, we conclude that the magistrate judge properly treated the motion as one to compel rather than one to reopen discovery. The relief Schulte requested was a court order directing the USPS to produce the requested reports on the grounds that it was easy to do and would not require writing a new computer program. Indeed, in this court, despite claiming that her motion was not one to compel, Schulte states that at the hearing before the magistrate judge,

she "argued that . . . production *should be compelled* " for these very reasons. Aplt. Opening Br. at 53 (emphasis added). Accordingly, the meet-and-confer requirement of both Fed.R.Civ.P. 37(a)(2)(B) and LCvR 37.1 applied.

We review the denial of a motion to compel for abuse of discretion. *Norton v. City of Marietta*, 432 F.3d 1145, 1156 (10th Cir.2005) (per curiam). "Under this standard, we will not disturb a trial court's decision absent a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* (quotation omitted). We review a district court's application of its local rules for abuse of discretion. *See Hernandez v. George*, 793 F.2d 264, 266 (10th Cir.1986).

To reiterate, the magistrate judge denied Schulte's motion to compel because futility was not a listed exception to the meet-and-confer requirement of LCvR 37.1. Schulte argues that futility is an appropriate exception and cites to one district court opinion, *In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 351, 356 (N.D.Ill.2005), that acknowledged that the futility doctrine was applicable to meet-and-confer requirements of the local rule.

Assuming that the futility doctrine is applicable, a matter we need not decide, we conclude that compliance with the meet-and-confer requirement would not have been futile in this instance. Schulte's motion was based on allegedly new information, the Reinolds affidavit, and she supported her motion with Callicoat's testimony. The magistrate judge could not understand how Schulte could be simply "rehashing" the same discovery request (and thus claiming

futility) when she had information of which the USPS allegedly was unaware concerning the ease with which the requested information could be drawn from USPS databases. Aplt. App., Vol. I at 240:5-8. We agree. Had Schulte presented this information to opposing counsel prior to filing her motion, the USPS may have reconsidered its position or argued that Schulte's new information was erroneous, either of which in turn may have avoided the need for court intervention and fulfilled the purpose of the meet-and-confer requirement. Futility therefore was not an appropriate reason for noncompliance. The magistrate judge's order denying the motion to compel on the ground that Schulte did not comply with the meet-and-confer requirement was not an abuse of discretion, particularly in view of the fact that the magistrate judge previously had excused Schulte's failure to comply with the requirement in connection with her Second Motion to Compel and the magistrate judge's reference to Schulte's repeated failure to follow court rules and lack of diligence in developing her case. Accordingly, we affirm the magistrate judge's order on this basis and need not address the alternate basis on which the magistrate judge relied.

2. Exclusion of evidence

Schulte contends that the district court wrongly excluded evidence from Steve Lundak, who was the station manager at the Chimney Hills Postal Station at the time she worked the temporary 204-B position. "We review a district court's exclusion of evidence for an abuse of discretion." *Cartier v. Jackson*, 59 F.3d 1046, 1048 (10th Cir.1995).

At trial, Schulte's attorney asked Lundak if he knew what factors typically cause the termination of a 204-B position. The district court sustained an objection by the USPS because Schulte's claim as to that job action had been dismissed. Schulte's counsel then made an offer of proof, stating that Lundak's testimony would show that he did not want Schulte removed because she did a good job for him but that "he had to have that happen," and that his evaluation of her work performance in her 204-B position was relevant to her performance just a few months later in connection with the allegation that she had recirculated the mail. Aplt.App., Vol. II at 546:22 to 547:7. The court noted that counsel had just asked Lundak about his view of her performance, which he had answered, repeated that the objection would be sustained, *see id.* at 547:8-12, and sustained further objections as counsel continued to question Lundak about the termination of Schulte's 204-B position, *see id.* at 547:14 to 550:4.

Schulte now claims that Lundak's testimony would have revealed the role that Susan Beck, postmaster of Tulsa, played in the decision to remove Schulte from her 204-B position, which would have put "into a very different light" Beck's role in Schulte's discipline and the denial of her 2002 ASP application. Aplt. Opening Br. at 29-30. This theory differs from the offer of proof counsel made at trial, which concerned only Lundak's opinion of Schulte's performance and the fact that he did not want her removed. We ordinarily do not consider new theories on appeal, even one "that falls under the same general category as an argument presented at trial or . . . a theory that was discussed in a vague and ambiguous way." *Bancamerica Comm'l Corp. v. Mosher Steel of Kan., Inc.*, 100 F.3d 792, 798-99 (10th Cir.) (quotation omitted),

opinion amended on other grounds, 103 F.3d 80 (10th Cir.1996). But even considering Schulte's argument, it fails because Schulte has made no showing that Beck's role in Schulte's removal from her 204-B supervisory position was motivated by age bias. Lundak's testimony, therefore, if indeed it would have encompassed Beck's role in that removal, as Schulte argues on appeal, would have been irrelevant to whether any role Beck might have played in either of the later employment actions was motivated by age bias. We therefore conclude that the district court did not abuse its discretion when it refused to permit Lundak to testify about Schulte's removal from her 204-B position.

3. The district court's consideration of the evidence

The bulk of Schulte's appellate argument concerns her view that the district court overlooked or mischaracterized certain evidence presented at trial. She suggests that properly construed, the evidence is so overwhelmingly in her favor that this court should enter judgment in her favor.[5] To the

5. The Postal Service argues that by failing to move for judgment as a matter of law under Federal Rule of Civil Procedure 50 in the district court, Schulte has waived appellate review of the sufficiency of the evidence insofar as she repeatedly suggests that this court may enter judgment in her favor because the evidence weighs so strongly in her favor. Rule 50 by its express language applies only to jury trials, not bench trials. The applicable rule in bench trials provides that "[w]hen findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings." Fed.R.Civ.P. 52(b). *See*

(Cont'd)

extent Schulte challenges the district court's findings of fact, we review for clear error, giving due regard to the trial court's opportunity to judge the credibility of the witnesses. *See* Fed.R.Civ.P. 52(a). "[T]he question for this court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether on the entire evidence [we are] left with the definite and firm conviction that a mistake has been committed." *N.L.R.B. v. Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384, 1387 (10th Cir.1992) (quotations and alteration omitted) (en banc). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Further, it is not our function "to infer material facts." *Transport Equip. Co. v. Guaranty State Bank*, 518 F.2d 377, 383 (10th Cir.1975). And we may not make a controlling inference that the trial court did not make "and which, if done, would in effect constitute a trial de novo." *Id.*

Schulte's contention that the court overlooked evidence is based in large part on the fact that the district court stated a number of times in its decision that she had presented "no evidence" (or some variant of that phrase) on a certain point. *See, e.g.*, Aplt.App., Vol. I at 360, ¶ 32; 364, ¶ 50; 366, ¶ 60; 366, ¶ 62; 373, ¶ 88; 377, ¶ 97; 378, ¶ 104; 380, ¶ 109; 382,

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also Colonial Penn Ins. v. Market Planners Ins. Agency, Inc., 157 F.3d 1032, 1036-37 & nn. 2-3 (5th Cir.1998) (failure to file post-trial motion after bench trial does not preclude appellate challenge to sufficiency of the evidence). Accordingly, Schulte's arguments concerning the sufficiency of the evidence are not waived.

¶ 114. Schulte concludes that these types of statements mean that the district court based its ruling only on her failure to present any direct evidence of discrimination when in fact, according to her, she presented a large quantity of indirect evidence that supported her claims such "that judgment may be entered [in her favor] on the strength of the omitted evidence alone," Aplt. Opening Br. at 9. To this extent, Schulte in effect contends that the district court committed a legal error. We review the district court's application of legal standards de novo. *Sinajini v. Bd. of Educ.*, 233 F.3d 1236, 1240 (10th Cir.2000).

As we proceed to discuss with reference to the district court's treatment of the evidence, Schulte's reading of the court's use of the phrase "no evidence" and its variants is flawed. The court's use of that phrase encompassed direct or indirect evidence, or both, depending on the context. It is clear that on certain points Schulte had presented no competent evidence, direct or indirect, while on others she presented no persuasive evidence either because the witness was not credible or less credible than another witness, the testimony was irrelevant, immaterial, speculative, or nonprobative, or the testimony conflicted with other testimony that the court considered persuasive. As to still other points, the district court was not required to discuss particular testimony for reasons we have explained as follows:

> The exclusion of certain testimony from the findings is not necessarily an error. In making findings under [Rule 52], a trial court is not a dictating machine. Its findings do not have to

> contain evidence supporting every possible viewpoint. The judge weighs the evidence and ascertains what the facts are. Nor need the trial court make findings as to every detail. [Rule 52] does not require the making of elaborate findings extending into minute and unnecessary detail on every feature of the case, but is met in full measure if the findings cover in clear, definite and concise language the contested issue or issues in the case. Findings of fact are sufficient if they indicate the factual basis for the court's general conclusion as to ultimate facts and are broad enough to cover all material issues.

Nulf v. Int'l Paper Co., 656 F.2d 553, 561 (10th Cir.1981) (internal citations and quotation marks omitted). With these prefatory remarks in mind, we now turn to Schulte's specific arguments concerning witness testimony.

Thomas Stone. Stone testified as an expert witness for Schulte. Schulte argues that his function was not to establish age discrimination but to establish that the method used to select a candidate for the 2002 ASP position was unreliable. Nevertheless, as Schulte acknowledges, Stone discussed the comparative qualifications of Schulte and Jorge Torrico. Both Schulte and Torrico had applied for the 2000 and 2002 ASP positions. In 2000, when Schulte was fifty-nine and Torrico was thirty-eight years of age, each candidate had similar KSA scores but Schulte scored higher in the interview process. Neither was selected. In the 2002 process, each of their KSA answers were substantially similar to the answers each gave in 2000, yet Torrico's scores stayed the same or went up while

Schulte's score went dramatically down on the KSA concerning decision-making, which led to her disqualification from consideration. Stone concluded that the disparity in scores could not be explained by anything other than age bias. *See* Aplt. App., Vol. II at 415:24 to 416:1; 424:22 to 425:5.

Stone further discussed documents he reviewed, which, according to Schulte, show that both candidates for the 2000 ASP position over fifty were eliminated quickly and only one candidate over forty made it past the first stage of review and even then was rated fifth out of six. Aplt. Opening Br. at 16.[6] And also according to Schulte, the documentation shows that in 2002, candidates over forty-six years of age were eliminated in the first round, including Schulte, and the successful candidates were ranked in reverse order by age (i.e., youngest first, oldest last). *See id.*

The district court found that Stone's opinion concerning age bias in the 2002 ASP application process was unsupported because he could not offer any empirical data that the hiring system was infected with age bias, could not exclude other biases, failed to review relevant evidence such as testimony or statements by the ASP decision-makers or the guidelines they used, was unaware that the 2000 ASP position was in the plant side of operations and the 2002 ASP position was in customer service (ostensibly requiring different skill sets), and made no allowance for innocent differences of opinion

6. We note that this summation of the documentary evidence does not appear to account for Schulte's selection for an interview for the 2000 ASP position. *See* Aplt.App., Vol. IV at 1034 (letter informing Schulte that she was selected for interview).

between the 2000 and 2002 ASP committees. Aplt.App., Vol. I at 368-69, ¶ 71-72, 74. The court also noted several of Stone's admissions about the deficiencies in his opinion that can best be summed up by an excerpt from his own testimony: "I don't have the kind of evidence I would need for a clear finger that points to age bias. I know there must have been some kind of bias because the qualifications were so equal yet the outcome was so different." *Id.*, Vol. II at 448:18-21.

We conclude that the district court's findings of fact as to Stone are not clearly erroneous. Contrary to Schulte's argument, the court did not "shut its eyes" to the evidence of age bias that Stone presented or the supporting documentation in the record, Aplt. Opening Br. at 17. The court heard Stone's extensive testimony, considered its shortcomings, and found considerable flaws in it. Nothing in Stone's testimony or the documentation required the district court to find otherwise. Even if we agreed with Schulte that Stone's testimony established that the 2002 ASP committee "could" eliminate older workers if it wanted to do so because the selection system was flawed, *see id.* at 42, Stone's speculation did not require the district court to find that the committee did so.

In its conclusions of law, the district court noted that Schulte had offered Stone's opinion, as well as her own, that she was qualified for the 2002 ASP position, but concluded that the relevant consideration was the USPS's perception of her abilities. *See* Aplt.App., Vol. I at 379, ¶ 108. Schulte contends that this was a legal error because the evidence is relevant to the legitimacy of the Postal Service's asserted perception under *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808 (10th Cir.2000). As we explained in *Tyler*, "evidence

indicating that an employer misjudged an employee's performance or qualifications is, of course, relevant to the question whether its stated reason is a pretext masking prohibited discrimination." *Id.* at 814 (quotation and brackets omitted). We agree therefore that the evidence of Schulte's qualifications was relevant, but the district court further stated that even if the committee's assessment of Schulte's qualifications was incorrect, there was no reason to believe that the committee had acted in bad faith or that their decision was the result of age bias, *see* Aplt.App., Vol. I at 380, ¶ 109. Schulte takes issue with that statement, which is a factual finding although not denominated as such, *see Sanchez v. Philip Morris Inc.*, 992 F.2d 244, 247 (10th Cir.1993) (whether discrimination is intentional is a factual question), by asserting that "[t]he evidence is overwhelming that the 2002 committee did not act in good faith." Aplt. Opening Br. at 42. The district court disagreed with Schulte's evaluation of the evidence, and we see no clear error in that disagreement. As discussed below, the evidence was not overwhelming that the 2002 committee acted in bad faith.

Gus Reinolds. Reinolds had worked in human resources for the USPS in Tulsa in the early 1980s and later held USPS positions in Texas related to transportation services and contracts. Although the district court found that he had no involvement with Schulte's employment or her 2002 ASP application, *see* Aplt.App., Vol. I at 369, ¶¶ 75-76, which implicitly suggests the court found his testimony to be irrelevant, the two were socially acquainted. Schulte told him that she was concerned that her nonselection for the 2002 ASP position was due to age bias. The only portion of Reinolds's testimony that Schulte references is the following,

which she contends is evidence of the Postal Service's pattern and practice of age bias: "Myself personally, ... at age 59, that's kind of late to be putting in for that type of position because if you want to go higher, you've got to put some time into those positions. . . . [I]f I've got 30 applicants, I'd say younger versus older." *Id.*, Vol. II at 465:11-18. The district court sustained a relevancy objection to that testimony. *Id.* at 465:22.

While pattern or practice evidence may be relevant to a disparate treatment case, the evidence must relate to the employer's practice. *See Coe v. Yellow Freight Sys., Inc.*, 646 F.2d 444, 449 (10th Cir.1981). Contrary to Schulte's argument, the preface to Reinolds's statement, "[m]yself personally," Aplt.App., Vol. II at 465:11, clearly indicates that regardless of whether or not his past work experience was in a managerial capacity, as Schulte contends, he was providing his own views, not those of the Postal Service. The district court did not err in determining that Reinolds's statement was irrelevant.

Paula Quinn. Quinn worked with Pam Cameron sorting mail at the Chimney Hills Postal Station. Her testimony primarily concerned innocent ways mail could be recirculated and Cameron's work ethic and sorting accuracy. The district court discounted Quinn's testimony because she could not remember if she was present on the day Schulte allegedly recirculated the mail and because her description of scenarios in which there could be continued errors in recognizing a scheme did not exist on the date in question and could not apply where "Schulte acknowledged, on sight, that the mail in question belonged to her route." *Id.*, Vol. I at 362, ¶ 41.

We see no clear error in the district court's treatment of Quinn's testimony as it relates to Cameron.

Lynn Jones. Jones, who worked as a postmaster for twenty years in several Oklahoma communities and was retired at the time of trial, testified that she had been discriminated against in a number of ways because of her age. In particular, she stated that younger postmasters were able to secure various supervisory assignments while she was not, and that after she turned fifty, her requests for support staff and funding went unfulfilled while younger postmasters' staffing requests were fulfilled and she experienced budget cuts. The district court determined that her ambiguous testimony failed to exclude nondiscriminatory explanations and also was irrelevant because there were no decision-makers common to, and no similarity between, the adverse employment actions Jones alleged were due to age bias and Schulte's nonselection for the 2002 ASP position. *See id.* at 369-70, ¶¶ 77-79; 381, ¶ 114.

Schulte argues that the district court overlooked Jones's testimony and that the testimony was relevant. We disagree. Contrary to Schulte's argument, the district court did not overlook Jones's testimony-the court expressly discussed it, although perhaps not in as much detail as Schulte would have liked. *See id.* And while Jones's testimony may have been relevant despite the fact that there were no common decision makers, it was of little persuasive value. In *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223 (10th Cir.2006), we declined to extend the "same supervisor" requirement to contexts other than those involving discriminatory discipline, in particular to a case where a plaintiff claims to be a victim

of a company-wide discriminatory reduction in force. *See id.* at 1226-28. This reasoning applies equally to a failure to promote claim. An inference that an employer maintains a broad discriminatory policy can be drawn from evidence that an employer refused to promote other employees who are in the same protected class as the plaintiff. Such evidence therefore may be relevant to the plaintiff's individual claim that a particular failure to promote is discriminatory regardless of whether the same decision makers were involved in the various decisions. On that score, the district court properly admitted Jones's testimony over objection. But when testimony like Jones's is, as the district court concluded, "so ambiguous as to wholly fail to eliminate nondiscriminatory explanations for any disparate treatment she may have observed," Aplt.App., Vol. I at 382, ¶ 114, it would be unreasonable to draw an inference that the employer maintains a broad discriminatory policy, particularly when the employer is as large as the Postal Service and the plaintiff presents only one witness complaining of allegedly similar treatment. Accordingly, Jones's testimony, although marginally relevant, was not persuasive evidence in support of Schulte's claims, and we see no clear error in the district court's conclusion.

Steve Lundak. Schulte asserts that the district court failed to consider certain "critical facts in its deliberations." Aplt. Opening Br. at 21. The first of these purportedly critical facts is the relative length of time Lundak and Lawrence had supervised her. Schulte contends that because Lundak supervised her for a much longer period (seven years) than Lawrence (three months), the district court erred in not weighing Lundak's positive assessment of her performance

for him against the negative assessment Lawrence provided in an evaluation related to Schulte's 2002 ASP application. We disagree. Lundak's testimony about Schulte's job performance and the length of time he had supervised Schulte were of little probative value in deciding whether Lawrence's own evaluation of Schulte's performance was genuine or motivated by an improper factor.

Schulte also notes the discrepancy between Lundak's testimony that there were a small number of employees who were over fifty when they were promoted to a supervisory position and her own testimony that none of those employees were over fifty. She then criticizes the Postal Service for not producing any employees over the age of fifty who were promoted. Schulte has provided no legal authority for the proposition implied in her argument-that the Postal Service was required to identify employees over the age of fifty who were promoted in order to prevail at trial-and we have found none. Whether or not Lundak's testimony concerning the age of promoted employees was incorrect, therefore, concerns a detail that is of little import in the overall analysis of the evidence, and the district court had no reason to discuss it.

Schulte further takes issue with the district court's treatment of a comment she alleges Lundak made to her in February 2002, that there are no 204-B temporary supervisors over the age of fifty nor are such persons entered into ASP training. *See* Aplt.App., Vol. II at 621:1-3. Lundak testified that he had never made any such age-related comment to Schulte. *See id.* at 551:22. The court found that Schulte failed to establish any nexus between the alleged comments and the 2002 ASP selection process, in particular because Lundak

did not know the identity of any of the members of the 2002 ASP committee. *Id.*, Vol. I at 367, ¶ 66. Schulte offers only her own view that Lundak offered his alleged comments in order to advise her "of the postal pattern and practice of refusing promotion to its older workers." Aplt. Reply Br. at 9. We agree with the district court that if Lundak made the alleged comment, Schulte failed to establish any nexus between it and her nonselection for the 2002 ASP position.

The court further stated that Schulte's initial EEO claim of discrimination, filed three months after Lundak's alleged comment, was "wholly inconsistent with her testimony about Lundak's statements" because she did not assert age discrimination as a basis for her claim until later. Aplt.App., Vol. I at 367, ¶ 65. This was a proper inference for the district court to draw, albeit one of minimal importance.

Jeffrey Dalton. Dalton, the USPS investigator, testified that when he first received Lawrence's report recommending that Schulte be removed for recirculating the mail, his opinion was that the report did not support removal. He sent a fax to O.D. Curry, a USPS labor relations specialist, to this effect. *See id.*, Vol. IV at 1063. Dalton further testified that after receiving copies of the allegedly recirculated mail and interviewing witnesses, he agreed that removal was proper. Schulte, however, contends that Dalton initially received copies of the marked mail because the report Lawrence sent indicated that the letters were attached and Lawrence testified to that effect at trial. By this assertion, Schulte apparently would have us conclude that Dalton's original opinion-that removal was not warranted-was based on all the evidence and his later, contrary position is the sort of inconsistency

that undermines the Postal Service's asserted nondiscriminatory reason for disciplining her.

The district court's resolution of these two plausible versions of events cannot be clearly erroneous. *See Anderson*, 470 U.S. at 574, 105 S.Ct. 1504. Contrary to Schulte's contention that the district court "glossed over this evidence merely because it did not contain a direct admission of age discrimination," Aplt. Opening Br. at 22, the district court found that Dalton did not receive copies of the mail until later in his investigation, and that receipt of those letters eliminated innocent explanations. Aplt.App., Vol. I at 361, ¶ 35. In reaching this finding, the court also considered Curry's corroborating testimony that early on, he and Dalton did not have copies of the letters. *See id.*, ¶ 36. Moreover, the district court acknowledged Dalton's testimony that he needed more particular information from witnesses, not just copies of the mail pieces, *see id.*, ¶ 35, which undermines Schulte's theory that his initial opinion represented his true opinion of the case simply because he already had seen the mail pieces.

Lila Lawrence. Schulte notes contradictions in the witness statements Lawrence obtained from other Postal Service employees in connection with her investigation, such as who had marked the mail and whether the mail was marked with an "x" or either an "x" or a check mark. Schulte concludes that the statements formed an unreliable basis for Lawrence's conclusion that Schulte had recirculated mail, which apparently suggests that the Postal Service's explanation for why it disciplined Schulte was implausible. Schulte also points to Lawrence's testimony that she did not

include in the report she sent to Dalton a witness statement from Quinn that was beneficial to Schulte. While these points might support a finding that the investigation was imperfect, they are too minor to show that Lawrence's belief that Schulte had recirculated mail was not genuine. *See Pastran v. K-Mart Corp.*, 210 F.3d 1201, 1206 (10th Cir.2000) (inquiry is not whether employer was right to think an employee engaged in misconduct but whether the belief was genuine).

Lawrence also testified that she had actually seen Schulte recirculate mail. Schulte asserts that this was the first time Lawrence had ever mentioned this, implying that Lawrence fabricated the statement. Even if Schulte is correct, the alleged fabrication does not exclusively suggest age bias such that we might see clear error in the trial court's conclusion that Lawrence had a good-faith belief that Schulte had recirculated the mail, *see* Aplt.App., Vol. I at 373, ¶ 88.

Schulte's final contention, that the failure to inquire into whether or not the recirculated mail would have actually increased her salary, appears irrelevant. Lawrence's testimony suggests that the mere attempt would have been a sufficient basis for termination because it "could inflate her count." *See id.*, Vol. II at 751:11.

George Frame and Susan Beck. As noted, Frame and Beck, postmasters of Oklahoma City and Tulsa, respectively, were members of the 2002 ASP committee. The district court found that Schulte "presented no evidence that any committee member in the 2002 ASP application review process calculated or estimated Ms. Schulte's age or the age of any other applicant." *Id.*, Vol. I at 364, ¶ 50. Schulte takes issue

with Beck's claim that she did not identify Schulte from the redacted application form submitted for the 2002 ASP position, comparing it with the testimony of Lynn Jones that, while Jones was a postmaster, all promotion applications came to her unredacted. To the extent Jones's testimony suggests that as a general matter postmasters always receive unredacted application forms and therefore Beck must have, it supports one of two plausible findings, and the district court's choice between them cannot be clearly erroneous. *See Anderson*, 470 U.S. at 574, 105 S.Ct. 1504.

Schulte also places much stock in the purportedly conflicting explanations she received concerning why her answer to the decision-making KSA led to her nonselection for the 2002 ASP position. She claims that she was told both that she did not describe making a decision at all and that she described making a decision that she did not have the authority to make. She compares this with the 2000 ASP committee's approval of the substantially same answer she submitted then and concludes that the reason for her nonselection in 2002 was a fabrication. *See* Aplt. Opening Br. at 49-50.

Again, evidence that an employer misjudged an employee's qualifications is relevant to whether its stated reason is a mask for prohibited discrimination. *See Tyler*, 232 F.3d at 814. But as the district court found, different committees and committee members could reach different results concerning qualifications. *See* Aplt.App., Vol. I at 365-66, ¶¶ 59-60. We agree even if, as Schulte contends, her authority to make the decision she described in her KSA presented a factual question that each committee should have

answered in the same way. Inconsistencies that may be attributable to differences in employer representatives or human error are of insufficient probative value to render the district court's findings in this case clearly erroneous.

Schulte further contends that she was given conflicting answers about the number of KSAs on which she failed to demonstrate adequate achievement. *See* Aplt. Opening Br. at 30-31. The record, however, does not unequivocally support this contention. Two letters written by Gwen O'Brien showed that she had not demonstrated proficiency in five of the KSAs. Aplt.App., Vol. IV at 1073, 1075. A later email from Jackie Bouffard, one of the 2002 ASP committee members, discussed only one of the KSAs because, as Bouffard wrote, the failure to demonstrate one KSA required no further evaluation. *See id.* at 1077. That email does not indicate whether Schulte's answers to the other KSAs were deficient or not. The perceived "conflict" among these letters therefore is minimal at best, and the district court was not required to address it.

Jackie Bouffard. Bouffard testified that the 2002 ASP committee worked to build consensus about each applicant's answers to the KSAs. Schulte argues that Bouffard's testimony tended to support that there was undue influence on the committee and that the district court ignored that testimony. Again, the district court found that each testifying board member stated that no undue influence occurred. *Id.*, Vol. I at 364, ¶ 50. Schulte's reading of Bouffard's testimony as suggesting otherwise is contrary to the record. Bouffard did not recall anyone talking about the age of the applicants, particularly as might be gleaned from the listed dates of high

school graduation on the redacted application form. *See id.*, Vol. III at 893:15-22. She further stated that "[a]ge has no bearing on these applications" and is "not necessarily something you discuss." *Id.* at 894:1-5. When asked if she would change her evaluation about the answer to a particular KSA if another committee member brought up the applicant's age, Bouffard stated that she looks at "what's written. You're not looking at those other factors." *Id.* at 899:5-9. She further testified that she would be unable to know if another committee member had a bad motive if it was not communicated to her. *Id.* at 899:20 to 900:3. Nothing in her testimony suggests that the district court's factual finding was clearly erroneous.

O.D. Curry. Schulte contends that Curry's testimony shows that another Postal Service employee who also was accused of recirculating mail during the March 2002 mail count, Sherry Birt, was not treated similarly to Schulte because Birt was offered a settlement and Schulte allegedly was not. This contention overlooks the district court's primary reason for rejecting it-that the only evidence of Birt's age was Schulte's own assessment. *See id.*, Vol. I at 376, ¶ 95; *see also id.*, Vol. II at 666:12-13 (Schulte's testimony that Birt was "a number of years younger than" her). No reasonable inference as to Birt's age may be drawn from Schulte's ambiguous testimony. *See Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 521 (10th Cir.1987) (reasonable inferences must be more than speculation and conjecture).[7] We need not address the district court's alternate

7. Schulte points to the testimony of another witness who was forty-seven at the time of trial, Randy Robinson. When asked if Birt

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basis for rejecting the Postal Service's treatment of Birt as a comparator case, that Schulte did receive the same offer but refused it, and we decline to address the remainder of Schulte's arguments concerning Curry's testimony because they raise matters of no consequence.

Pam Cameron. Schulte takes issue with a perceived discrepancy between Cameron's testimony that she saw Schulte return marked mail to the misthrow case, which the district court noted in its findings, *see* Aplt.App., Vol. I at 355, ¶ 12, and the omission of this detail from the contemporaneous witness statement Cameron had given to Lawrence. When asked about this discrepancy, Cameron testified that she was only required to write a short statement about what happened, which did not require her to include her observation of Schulte, and that she wrote a very short statement because she had never dealt with anything like this in her twenty years with the Postal Service. *Id.*, Vol. III at 978:4-9. This suggests a credibility issue on which sufficient evidence existed for the district court to find Cameron credible.

Schulte points to Cameron's description of other ways the marked letters could have been sent through the misthrow case in support of her disagreement with the district court's finding that she offered no innocent explanation for the same

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(Cont'd)
was about his same age, Robinson replied "I don't-I guess." Aplt.App., Vol. III at 866:25 to 867:2. To the follow up query, "More or less?," he replied, "Uh-huh." *Id.* at 867:3-4. Like Schulte's testimony, Robinson's is so ambiguous as to offer no support for her claim.

mail pieces coming through as misthrows multiple times, *see id.*, Vol. I at 355, ¶ 13. This presents a factual question implicating Cameron's repeated testimony that those methods would not account for the same mail being recirculated multiple times. *See id.*, Vol. III at 966:19-22; 972:23. The district court apparently resolved that question against Schulte, and we see no clear error.

Karen Schulte. Schulte's primary discontent with the district court's findings as to her testimony is the following: "Schulte admitted at trial that she has absolutely no evidence of any kind to support her allegation that Ms. Lawrence's actions in proposing her removal were motivated by age bias." *Id.*, Vol. I at 360, ¶ 32. Schulte argues that at most, this admission concerns only direct evidence, then concludes that the court's finding indicates its disregard of indirect evidence. Aplt. Opening Br. at 12. We see nothing improper about the district court's accurate finding as to Schulte's express agreement that she had not presented any "incidents" or other "anecdotal evidence" that showed Lawrence was motivated by age bias. *See* Aplt.App., Vol. II at 663:19-22. And as we noted above, this finding does not indicate that the court was looking for only direct evidence of discrimination or based its decision exclusively on the absence of direct evidence.

Schulte further takes issue with the district court's treatment of evidence that she applied for and did not receive a number of other supervisory positions, which the court admitted as pattern or practice evidence. The court noted only that Schulte admitted she was not qualified for some of the positions for which she had applied. *Id.*, Vol. I at 368, ¶ 69.

She artfully claims that "[t]he Court did not consider the far more numerous positions which [I] was denied, although [my] eligibility for them was never challenged." Aplt. Opening Br. at 40. Schulte's testimony regarding those other positions does not show that she was qualified for them. In presenting pattern or practice evidence to bolster her case, the burden was on her to present evidence from which an inference could be drawn that age bias was the reason she did not receive any promotions. She only established that she had applied for a variety of positions and that she was either not contacted about her application, overlooked for an unspecified reason, or denied for a nondiscriminatory reason. *See, e.g.*, Aplt. App, Vol. II at 599:16-23; 604:11 to 605:6; 606:9-18. Nothing suggests that she was qualified for any of those positions or overlooked or denied because of her age.

Schulte also offered testimony about Tom Mullins, a USPS human-relations employee who worked as a mail counter for Schulte's route in March 2002. According to Schulte, Mullins introduced himself a day or two before the mail count and asked her about her retirement plans. *Id.* at 628:4 to 629:9. She further testified that Mullins took mail pieces to a clerk to inquire whether they belonged to her scheme and later completed a witness statement accusing her of recirculating mail. *Id.* at 629:18 to 630:5. She contends that Mullins's comment about her retirement was not a stray remark lacking any nexus to the employment decision, as the district court stated, *see id.*, Vol. I at 358-59, ¶ 28; 374, ¶ 91, but part of a "mosaic of evidence that, taken together, creates an inference of age discrimination," ostensibly under the "cat's paw" theory of liability, *see* Aplt. Reply Br. at 8-9.

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As we recently explained, the "cat's paw" theory of liability (also referred to as the "rubber stamp" or "subordinate bias" theory) requires "a plaintiff [to] establish more than mere 'influence' or 'input' in the decisionmaking process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action." *E.E.O.C. v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487 (10th Cir.2006), *cert. granted*, __ U.S. __, 127 S.Ct. 852, 166 L.Ed.2d 681 (2007) (No. 06-341). We further explained that "an employer can avoid liability by conducting an independent investigation of the allegations against an employee." *Id.* at 488. Here, assuming that Mullins's remark about Schulte's retirement plans was evidence of his own age bias, any discriminatory animus he may have had toward Schulte could be a factor under the cat's paw theory if it caused Lawrence to recommend termination. But because there was sufficient evidence to show that Lawrence conducted an independent investigation, Schulte may not avail herself of the cat's paw theory of liability, and Mullins's alleged comment is irrelevant.

In addition to the foregoing, we have reviewed the remainder of Schulte's arguments and find that they either are presented in a conclusory fashion or, like many of those we have expressly considered, concern immaterial matters even when considered in the aggregate. We also have considered the points set forth in Schulte's supplemental authority and find them unpersuasive.

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The judgment of the district court is AFFIRMED.

Entered for the Court

Stephen H. Anderson
Circuit Judge

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED OCTOBER 19, 2005

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 03-CV-361-K(M)

KAREN K. SCHULTE,

Plaintiff,

v.

John E. POTTER, Postmaster General, USPS,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-styled case was tried to the Court without a jury on March 23-25, 2005 and March 28, 2005. Post-trial briefing has been completed. After considering the pleadings, the testimony and exhibits admitted at trial, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following Findings of Fact, Conclusions of Law and Judgment, in accordance with Fed. R. Civ. P. 52, as follows:

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FINDINGS OF FACT

1. Karen Schulte ("Ms.Schulte") is a Caucasian female.

2. Ms. Schulte is an employee of the defendant, the United States Postal Service ("USPS"). She worked as a Rural Carrier Associate from 1994 until 1999. From 1999 until present, she has worked as a Rural Carrier.

3. Ms. Schulte was born on June 9, 1941, and, at all relevant times, was over forty years of age. She was also over age forty when hired by the Postal Service.

4. Ms. Schulte alleged age bias as the cause for (1) her March 5, 2002, discipline where termination was proposed, but ultimately mitigated to a lengthy suspension, and (2) the non-selection of her 2002 application to a management training program, referred to as the Associate Supervisor Program or "ASP."

FINDINGS OF FACT: TERMINATION

5. Ms. Pam Cameron ("Ms.Cameron") is a clerk employed by the Postal Service. She testified that, during March 2002 at the Chimney Hills Station, it was her responsibility to bring mail in during the mornings and then sort it to the correct carrier. The carriers continued to "throw" or distribute mail as necessary during the day, including throwing mail which were "misthrows." Misthrows refer to mail

matter which had already been distributed, but to a wrong route. Carriers would recognize the mail as not belonging to their route and bring it to the misthrow case for the clerks to redistribute. The misthrow case is a large structure with different bins. The clerks redistribute the mail to the correct carrier through the "hot case."

6. The clerks learn the outermost boundaries of the entire route, but not each individual address therein. If a carrier recognizes an address as being within their boundaries, but being a nonexistent or non-deliverable piece of mail, the carrier must endorse it before returning it to the clerk.

7. Ms. Cameron had learned the "scheme" (defined as the route organization for a particular route) for Ms. Schulte's route twenty years earlier and had distributed mail to that scheme for approximately twenty years, either in the main plant or at Chimney Hills Station.

8. On March 5, 2002, the Chimney Hills Station was undergoing a rural carrier "mail count." Rural carriers, such as Ms. Schulte, are paid by piece work and the volume of mail is tracked over the particular days of the year designated as "mail count" days. Every piece of mail belonging to the carrier's route is physically counted during this time so as to extrapolate an annual salary.

9. During a mail count, a carrier who receives mail and knows it has been counted must inform the counter if the mail piece (or pieces) did not actually belong to their particular route.

10. During mail count, many carriers keep precise track of how much mail volume the counter is recording. Fifteen to sixteen extra counted pieces of mail can inflate an annual salary by as much as $1600.

11. On March 5, 2002, Ms. Cameron noticed that she was repeatedly getting the same pieces of mail through her misthrow case. She correctly sorted it, paying special and particular attention and taking care to be sure it was sorted to the correct route. When the mail came back, Ms. Cameron decided to mark the mail with a small "x" to make absolutely sure that the same mail was coming through the misthrow case.

12. Ms. Cameron testified she actually observed Ms. Schulte return mail marked with an "x" to the misthrow case.

13. Ms. Cameron also testified that there would be no innocent explanation for the same mail pieces coming through as misthrown multiple times. Plaintiff never offered any innocent explanation for the same, marked mail pieces having been returned to the misthrow case multiple times.

14. Ms. Cameron concluded Ms. Schulte was intentionally putting mail correctly sorted to her route

in the misthrow case, allowing the clerk to sort the mail to her route, retrieving the mail from the hot case and inflating her mail count. If the mail was returned time and again to the misthrow case, only to be distributed to Ms. Schulte again through the hot case, the same mail was being counted over and over and recorded on the mail count.

15. Ms. Lila Lawrence ("Ms.Lawrence") was Ms. Schulte's immediate supervisor on March 5, 2002. Ms. Lawrence received information regarding the recirculation of mail during the mail count from Ms. Cameron.

16. Based on this information, she asked Ms. Schulte to leave the floor and come into her office.

17. At that time, Ms. Lawrence, without argument or question, agreed to eliminate any piece of mail Ms. Schulte claimed was not on her route and not consider those pieces of mail. Ms. Lawrence considered only the mail that Ms. Schulte admitted that she recognized, by sight, as mail that did belong on her route. Ms. Lawrence did not consider as evidence the mail that Ms. Schulte did not recognize (for any reason) as belonging to her route. All actual mail pieces were delivered to the appropriate mail customers on that day.

18. Ms. Lawrence copied the mail to preserve a record of the exact pieces of mail being recirculated. Besides all written and photocopied materials, Ms. Lawrence

considered certain oral statements and her own observations. Ms. Lawrence wanted to see (and did observe) Ms. Schulte recirculate the mail to satisfy herself that Ms. Schulte was acting improperly. Ms. Cameron confirmed that Ms. Lawrence instructed her to distribute the mail and see if it came back. Ms. Lawrence stated that Ms. Cameron, the clerk who had sorted the mail and noticed the recirculation, was never inconsistent in her account of the relevant events and that she had been throwing the same scheme for twenty years.

19. The only explanation that Ms. Schulte ever offered was that another rural carrier-Don Miller-pulled her mail by mistake and placed it all in the misthrow case. Ms. Lawrence testified that Mr. Miller expressly denied that any such thing happened on the day in question. O.D. Curry ("Mr.Curry"), a labor relations specialist for the Postal Service, considered this explanation, interviewed Mr. Miller and satisfied himself that Ms. Schulte's explanation was simply not plausible.

20. If the recirculated mail had belonged to Ms. Schulte's route, but contained a bad address or non-existent address, Ms. Schulte should have endorsed the mail. The endorsement would essentially be communication to the clerk that would discontinue the recirculation.

21. On or about March 26, 2002, Ms. Schulte received a letter proposing her termination for dishonest

behavior and obstruction of efficiency and rural count accuracy in violation of the Employee and Labor Relations Manual. Within the letter, the charge is explained in detail:

> On March 5, 2002, during the Rural Carrier National Mail Count, scheme clerks observed that mail pieces found in misthrows were being repeatedly worked off your route. These pieces were identified as misthrows from route 3746. The clerk shared her concerns with the supervisor and affirmed the mail was properly addressed to route 3746. The mail pieces were marked with an "x" and returned to your route for proper casing and delivery. You again failed to work or case the mail and improperly returned the mail to the misthrow case. Evidence indicates that this mail is properly schemed to your route and should have been cased and delivered as addressed. Your improper repeated return of properly addressed mail served to inflate your mail count and needlessly caused employees to waste time on unnecessary distribution. You would have received actual times in your evaluation for unnecessary trips to the throwback case inflating your R column time. Your actions were clearly calculated to increase your elevated route time.

(Defendant's Trial Exhibit 7.)

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22. Ms. Lawrence proposed removal and was responsible for requesting such discipline. At the time, Ms. Lawrence did not know Ms. Schulte's age. No one pressured or influenced Ms. Lawrence in her decision; rather, she considered the recirculation of mail to be tantamount to stealing from the Postal Service. The Postmaster of Tulsa, Susan Beck ("Ms.Beck"), confirmed in her testimony that Ms. Lawrence had the authority to take such actions. While Ms. Beck, as Postmaster, would probably be made aware that a carrier was being terminated, her concurrence is not necessary. The clerk, Ms. Cameron, had no involvement in the disciplinary decision made by Ms. Lawrence.

23. At approximately this same time, another rural carrier, Sherry Birt (Ms. Birt), received a proposed termination for alleged dishonesty during the mail count.

24. Ms. Lawrence was responsible for the discipline of Ms. Birt. Ms. Lawrence did not know the age of Ms. Birt or Ms. Schulte.

25. Ms. Birt filed a grievance through the Union. During the very first stage of the grievance process, Ms. Birt accepted an offer by management to reduce the punishment and return to work.

26. Ms. Schulte also filed a grievance, but would not return to work under the same circumstances as Ms. Birt. Despite her representative's ability to negotiate

the same settlement as allowed Ms. Birt to return to work, Ms. Schulte refused.

27. Ms. Schulte filed an Equal Employment Opportunity ("EEO") Complaint of Discrimination in the Postal Service on May 21, 2002. Within this formal charge, she identified her removal as the adverse employment action prompting the charge, but only cited retaliation for previous EEO activity (and not age discrimination) as the basis for an EEO charge. This is inconsistent with her allegation (set out below) that discriminatory statements regarding age had been made to her for months before May 21, 2002.

28. Ms. Schulte alleged that Mr. Tom Mullins, who participated in the rural mail count in 2002, asked her about retirement plans. Ms. Schulte "associate [s]" Mr. Mullins with her attempted removal because he wrote a witness statement about what he observed on the day she recirculated mail. However, Ms. Schulte failed to establish any nexus or connection between alleged comments of Mr. Mullins and Ms. Lawrence's decision to propose her termination in March 2002.

29. Ms. Schulte's testimony that Mr. Mullins' comments evidenced age discrimination is wholly contradicted by her own behavior. She alleges that Mr. Mullins made the comment in February of 2002, as the mail count was starting. Yet, when she filed her EEO complaint just three months later to complain about her firing, she did not even bother to allege age as a purview of discrimination.

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30. Ms. Schulte testified that she disagreed with Mr. Mullins' counting of her mail and told him as much. Ms. Schulte stated that this disagreement happens "every year at every count". Ms. Schulte went so far as to show up on her day off to argue with her relief carrier about whether certain mail had been counted. Another carrier complained that Ms. Schulte had wrongfully taken a parcel from his route to her area in order for it to be counted and attributed to her route.

31. Ms. Lawrence completed an evaluation in connection with Ms. Schulte's application to the 2002 ASP program. Although the instructions on the front sheet of the evaluation say that ratings of "Not Acceptable" should be explained, Ms. Lawrence did not write any statement about her rating of Ms. Schulte. Ms. Schulte was found to be deficient in several areas. Ms. Lawrence testified that she failed to read the instructions which would require explanation of negative ratings at the time and was unaware of the instruction until just several weeks before the trial of this matter.

32. Ms. Schulte admitted at trial that she has absolutely no evidence of any kind to support her allegation that Ms. Lawrence's actions in proposing her removal were motivated by age bias. While Ms. Schulte denied recirculating mail, she never presented evidence of any kind that Ms. Lawrence did not hold the genuine belief that she had recirculated mail. In fact, she admitted that, in lieu of age bias, she believed that Ms. Lawrence was a "victim" of unspecified others.

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Others who reviewed Ms. Lawrence's decision and course of action with respect to Ms. Schulte's removal confirmed that she had made a proper and appropriate decision.

33. Mr. Steve Lundak was the station manager and Ms. Schulte's supervisor through January 2002. He had the opportunity to fill out a review that would accompany Ms. Schulte's application to the ASP program in 2000. At the time he filled out the review, Ms. Schulte had never performed any work as a supervisor; rather she had only worked as a rural carrier or rural carrier associate. Mr. Lundak testified that Chimney Hills is a large station and supervisors, such as Ms. Lawrence, have more information about the performance of a carrier than he would as station manager. Whereas a supervisor, such as Ms. Lawrence, would see carriers on a day-to-day basis, Mr. Lundak testified that many days could go by without his seeing individual rural carriers.

34. Ms. Lawrence believed that Ms. Schulte performed adequately as a carrier, but had concerns about her performance as a supervisor at the Chimney Hills Station. Ms. Lawrence answered an evaluation form regarding Ms. Schulte's ASP candidacy honestly, based upon her nine months of observation of Ms. Schulte in the exact supervisory position for which she was applying. Nothing on the form indicates it would be improper for Ms. Lawrence to draw from all sources of information she had available to complete her evaluation of Ms. Schulte.

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35. Mr. Jeff Dalton, a labor relations specialist for the Postal Service, testified that he initially received "generalities and no specifics on exactly what Ms. Schulte did" and was missing a "trail of mail matter" to support general allegations. He later interviewed Ms. Cameron, Ms. Lawrence and Laura Zaremba ("Ms.Zaremba") regarding exactly what had happened and how mail matter was marked to verify the allegations. He later obtained the photocopied pieces of mail which had been marked to document and verify Ms. Schulte's recirculation of mail matter. Having copies of the actual mail that Ms. Schulte recirculated allowed the elimination of innocent explanations for mail returning again and again to the misthrow case.

36. Mr. O.D. Curry, a labor relations specialist with expertise in the rural carrier area, also testified that, early on, he and Mr. Dalton did not have copies of the mail pieces.

37. Jeff Dalton routinely represents the USPS in labor arbitration matters. In such arbitration matters, the USPS would have the burden to prove just cause existed for removal of an employee, such as Ms. Schulte.

38. Neither Mr. Dalton nor Mr. Curry was free to contact Ms. Schulte to discuss the matter because it could result in a charge of an unfair labor practice under the labor contract.

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39. At an arbitration proceeding related to Ms. Schulte's removal, Mr. Dalton did, in fact, represent the Postal Service. The arbitrator found Ms. Schulte guilty of recirculating the mail.

40. Mr. Curry could remember "a number" of carriers under age 40 whose removal was proposed after misconduct during the count.

41. At trial, Ms. Schulte proffered the testimony of Pauline Quinn, a clerk at Chimney Hills. However, Ms. Quinn could not even remember whether she was at the Station the date Ms. Schulte allegedly recirculated mail. She could only offer possible ways in which mail could be returned to the misthrow case one time, but made clear that she could not offer any testimony about what Ms. Schulte did on the date in question. Moreover, specifically referring to Ms. Quinn's statement, Mr. Curry indicated that the information contained therein was investigated, by way of correspondence, conversations and even a visit to the Chimney Hills Station. Ms. Quinn's information involved situations or circumstances which simply did not exist on the actual day in question, such as mislabeled containers or tubs of morning mail from the main plant. Ms. Quinn's theory that continuous errors in recognizing a scheme could not apply where Ms. Schulte acknowledged, on sight, that the mail in question belonged to her route.

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FINDINGS OF FACT: 2002 ASSOCIATE SUPERVISOR PROGRAM APPLICATION

42. On February 19, 2002, the USPS issued a vacancy announcement for the Associate Supervisor Program ("ASP"), Customer Service.

43. The ASP is a program utilized by the USPS to select, train and place supervisors. To apply for the ASP, the applicant must submit the appropriate papers in response to an announcement. Applications are reviewed by a committee of postal officials, a test is administered, and personal interviews are conducted with a different committee of postal officials.

44. Ms. Schulte applied for the ASP, Customer Service position by submitting a Form 991, in which basic background and experience is recited. Ms. Schulte also included, as referenced in the vacancy announcement and as an attachment to her Form 991, her Statement of Achievement for certain Knowledge, Skills, and Abilities (or "KSA's"). Six specific areas (Leadership, Decision Making, Human Relations, Communications, Safety and Employee/Management Relations) were identified, and Ms. Schulte wrote a narrative to describe achievements that best demonstrated mastery of the area.

45. The Form 991 and attached KSA's were analyzed by a committee composed of four postal officials: (1) Susan J. Beck (Postmaster of Tulsa); (2) George F. Frame (Postmaster of Oklahoma City);

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(3) Elizabeth Inman (then Postmaster of Muskogee), and (4) Jacqueline Bouffard (then Manager of Training).

46. The Form 991 and attached KSA's were provided to these individuals for review with names and identifying information redacted. Applicants were identified by number. Individual committee members were to read, evaluate and rate the KSA's of the applicants on an individual basis.

47. A meeting was held on June 3, 2002, to prepare the "Consensus List of Ratings." This document was to represent the consensus of the reviewing officials and their best exercise of business judgment as to the degree of satisfactory responses provided on the KSA portion of each application.

48. At the meeting the officials used the letters "ND" to indicate that an applicant had not demonstrated their achievement of a particular KSA. A number of applicants, including Ms. Schulte, received "not demonstrated" ratings on one point or another and their applications were eliminated for any further consideration for the ASP program.

49. The youngest applicant reviewed did not advance and neither did the oldest applicant. Such evidence does not support any presumption of any discriminatory bias, either for or against older applicants, on the part of the Form 991 review committee.

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50. Plaintiff presented no evidence that any committee member in the 2002 ASP application review process calculated or estimated Ms. Schulte's age or the age of any other applicant. Plaintiff presented no evidence that any committee member in the 2002 ASP application review process did not honestly and accurately judge the applications submitted according to their training and written guidelines. Three of the four board members testified and each testifying board member specifically testified that no calculations of age, no discussion of age and no discussion of identity of applicants occurred. Each testifying board member testified that no undue influence by any other member affected their consensus in 2002. Each testifying board member testified that they had been subjected to some training in order to perform their review and/or had available specific guidelines which they attempted to apply.

51. George Frame, Postmaster of Oklahoma City, reviewed Ms. Schulte's 2002 ASP application. He never knew who she was and he never had information about her age.

52. Mr. Frame explained why the KSA section of Ms. Schulte's application failed to explain a problem, noting that her narrative regarding decision-making simply described the daily activities of the regular activities of a carrier.

53. Both Mr. Frame and Ms. Beck explained that Ms. Schulte's application failed to adequately discuss

decision-making because Ms. Schulte described doing things that a rural carrier position did not have the authority to do.

54. Ms. Beck, Postmaster of Tulsa, reviewed Ms. Schulte's 2002 ASP application. She did not know Ms. Schulte's age until a week before this matter went to trial.

55. Ms. Beck testified that, by the time the ASP applications were reviewed, she was aware that Ms. Schulte's removal was pending. Had she suspected that one of the applications she was reviewing was Ms. Schulte's, Ms. Beck testified she would have called labor to see if someone with a pending removal was even eligible for consideration for the ASP program. This evidence indicates that Ms. Beck did not attempt to identify the ASP applicants.

56. Mr. Randy Robinson (age 46), also a rural carrier at Chimney Hills, testified that he had to go through the ASP screening procedure three times before being chosen for an ASP position. He attempted to become an ASP at the same time as Ms. Schulte (in 2002) and was unsuccessful.

57. Under a similar procedure, a different committee was assembled in 2000 to review Ms. Schulte's application for the ASP, Processing and Distribution. "Processing and Distribution Operations" is commonly referred to as *plant* operations and is different from *customer service*, which primarily concerns carriers and contact

with the Postal customer. This 2000 committee for Processing and Distribution ASP's consisted of George Roberts, Jr., Manager, Human Relations; Donne Collins, Post Office Operations Manager, and Rick Shirley, Manager of In-Plant Support.

58. The 2000 committee for ASP, Processing and Distribution, reviewed Ms. Schulte's Form 991 and attached KSA's and found them to be satisfactory for their purposes. Her application advanced to the personal interview stage, although Ms. Schulte ultimately was not selected for the ASP, Processing and Distribution in 2000.

59. Ms. Beck testified that review committees filling ASP positions for the *plant* (Processing and Distribution) would be expected to have different results from a review committee filling ASP positions for *customer service*.

60. Ms. Schulte presented no evidence which suggests that members of the 2002 reviewing committee for Customer Service ASP were not free to exercise his or her own judgment regarding evaluation of Ms. Schulte's KSA's. There is no evidence that the 2002 committee was bound by or would even have reason to know of the rating given by a previous committee when considering Ms. Schulte for a different ASP. Ms. Beck testified that different review board members may have different opinions based upon their individual experiences with the Postal Service.

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61. Ms. Schulte has failed to establish any nexus or connection between her failed applications to various training and detail programs and the ASP committee's unfavorable action on her 2002 ASP application.

62. Ms. Schulte did not present any evidence of discriminatory animus by the officials who reviewed her Form 991 and KSA's (Susan J. Beck, George F. Frame, Elizabeth Inman, and Jacqueline Bouffard) in 2002. She could not recall any jokes, workplace incidents or derogatory comments concerning age, not even any general comments on the subject of age by any of these decision makers.

63. Mr. Steve Lundak was Ms. Schulte's supervisor until January of 2002, when he became Post Master of Mannford.

64. Ms. Schulte alleged that Steve Lundak ("Mr.Lundak"), her former supervisor, said that there are no 204-B temporary supervisors or ASP candidates who are over age fifty. At trial, Mr. Lundak, testified to the contrary, offering names of specific persons who he believed to be over age 50 who served as 204-B supervisor trainees. As such, Mr. Lundak "definitely" disagreed with Ms Schulte's testimony that the two ever spoke about age discrimination. When asked about Ms. Schulte's contention that he had said the USPS does not train persons over age 50 for supervision, he replied: "That statement never came from me." Tr. at p. 168. Mr. Lundak testified that he did not know the identity of the persons who

would review Ms. Schulte's application to the ASP program and did not know the identity of the persons who were on the ASP review board.

65. Ms. Schulte's actions are wholly inconsistent with her testimony about Mr. Lundak's statements concerning age discrimination. Her actions are more consistent with Mr. Lundak's denial that any such issue was discussed. She alleges that he told her the USPS discriminates based on age in February of 2002, but three months later, when she filed an EEO concerning her proposed termination, she did not even identify age discrimination as a possible purview of discrimination.

66. Ms. Schulte failed to establish any nexus or connection between alleged comments made by Mr. Lundak and the unfavorable decision made by reviewers of her Form 991 and KSA's in 2002. Moreover, Mr. Lundak's comments would not reasonably relate to the ASP decision makers at issue, because Mr. Lundak did not even know their identity.

67. Ms. Schulte could not have become elevated to supervisor in the USPS during the time her removal was pending and she would not have even been considered if the committee had identified her as someone with removal pending. Mr. Dalton only provided information to the ASP coordinators about Ms. Schulte's pending removal after June 3, 2002 (the date of the meeting the 2002 ASP application review committee assembled and, together, found Ms. Schulte's application to be unacceptable).

Appendix B

68. Consequently, even if Ms. Schulte had not received an "ND" and progressed in the application process, she would have been eliminated from further consideration once Mr. Dalton made the ASP coordinators aware of Ms. Schulte's pending removal.

69. Ms. Schulte admitted that she applied for positions for which she was clearly not eligible for, according to the clear terms of the vacancy announcement.

70. Ms. Schulte listed areas of interest for details, such as facilities design and electric vehicle maintenance. She presented no evidence that details in such areas of interest ever existed at a time she was eligible for detail assignments.

71. At trial, Ms. Schulte proffered the testimony of an expert witness, Mr. Thomas Stone. Mr. Stone could not offer any empirical data to support any conclusion that the USPS hiring system was infected by age bias. Although Mr. Stone believed something "weird" was happening, he admitted he could not eliminate a number of other non-age related biases.

72. Mr. Stone failed to review relevant evidence, such as testimony or statements by the ASP decision makers or the guidelines utilized by the ASP decision makers. Mr. Stone was completely unaware that Ms. Schulte applied for the *plant* ASP program in 2000 and the *customer service* ASP program in 2002. Mr. Stone insisted that the fact that Ms. Schulte was not selected "speaks for itself" and could not offer any other support for his accusations of age bias.

73. Mr. Stone concluded the ASP review committee acted properly and appropriately when it excluded the youngest member of the applicant pool, but assumed that bias must explain the elimination of the oldest member of the applicant pool (Ms. Schulte). Mr. Stone admitted that the only reason for his accusation of age bias was because Ms. Schulte was the oldest member of the 2002 applicant pool and she was eliminated.

74. Although Mr. Stone admitted that an entirely different committee reviewed Ms. Schulte's 2002 application than reviewed her 2000 application, he made no allowance for innocent differences of opinion, but rather, assumed that age bias would explain differences between the committees.

75. At trial, Ms. Schulte called Gus Reinolds. Mr. Reinolds has been employed by the USPS in positions related to transportation services and contracts in Texas through the 1990's until the present. In 1980, for approximately three years, Mr. Reinolds worked in human resources in Tulsa.

76. Mr. Reinolds never had any involvement in any situation involving Ms. Schulte's employment with the USPS or her application for the ASP program.

77. At trial, Ms. Schulte also called Lynn Jones as a witness. Ms. Jones has been Postmaster for several small communities in Oklahoma for twenty years. Ms. Jones claimed that the following events (which

she attributed to age bias) were visited upon her: (1) when she was 49 years old, her boss asked if she wanted to downgrade, causing her to believe she was being "put out to pasture"; (2) she was made to submit an application Form 991, but others were not; (3) a requirement that employees stay in a current position until having served at least one year was only "true for some people"; and, (4) as Postmaster, her requests for support staff were "delayed."

78. Ms. Jones never identified any of the decision makers or other employees involved in any of these alleged adverse employment decisions. Ms. Jones never properly identified the age, name or job of any comparitor employees. There was absolutely no evidence regarding the identity of the alleged discriminating official; much less any evidence that any person involved in any of these alleged adverse employment decisions had anything to do with Ms. Schulte's application to the ASP program in 2002. None of the alleged adverse employment actions that Ms. Jones testified about had any similarity to Ms. Schulte's contention that her 2002 ASP application was wrongfully rated as unacceptable.

79. Ms. Jones admitted that she has nothing to do with Ms. Schulte's application to the ASP program in 2002 and stated: "I don't know anything about Ms. Schulte's case." (Tr. at p. 128).

80. To the extent that any of these Findings of Fact constitute Conclusions of Law, they should be so considered.

Appendix B

II. CONCLUSIONS OF LAW

81. The "familiar *McDonnell-Douglas* ping-pong analysis is unnecessary at trial: Instead the ultimate test is whether plaintiff has produced enough creditable evidence to persuade the trier of fact that defendant acted with discriminatory intent and that such intent caused plaintiff's injury." *Dodoo v. Seagate Technology, Inc.*, 235 F.3d 522, 528 (10th Cir.2000).

82. In ADEA cases, "the plaintiffs' age must have 'actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome." ' *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (alteration in original) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)).

83. Age-related comments referring directly to the plaintiff can support an inference of age discrimination, but "isolated [or] ambiguous comments" may be, as here, too abstract to support such an inference. *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir.1994) (quoting *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025 (6th Cir.1993), *cert. denied*, 510 U.S. 861, 114 S.Ct. 175, 126 L.Ed.2d 135 (1993)). The court in *Cone* further reasoned that "[i]solated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions." *Id.* (citing *Leichihman v. Pickwick Int'l*, 814 F.2d 1263,

1271 (8th Cir.1987), *cert. denied,* 484 U.S. 855, 108 S.Ct. 161, 98 L.Ed.2d 116 (1987)). A plaintiff must demonstrate a nexus exists between the allegedly discriminatory statement and the company's decision, and therefore "that age actually played a role in the defendant's decision making process and had a determinative influence on the outcome." *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1455 (10th Cir.1994) (citing *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)).

84. In a claim for intentional discrimination, the only issue is whether the decision maker intentionally discriminated against the plaintiff when he initiated the adverse employment action. *Selenke v. Medical Imaging of Colorado,* 248 F.3d 1249, 1261 (10th Cir.2001) ("When assessing a contention of pretext we assess the facts 'as they appear to the person making the decision to terminate [the] plaintiff.' ") (*quoting Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1230 (10th Cir.2000)). The litigant may not simply point out that the employer was mistaken about a particular fact. *Hardy v. S.F. Phosphates Ltd. Co.*, 185 F.3d 1076 (10th Cir.1999). Nor is it sufficient for a litigant to simply complain that the punishment was harsh or unreasonable. *See Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 560 (7th Cir.1987) ("No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, Title VII . . . [does] not interfere."), *cert. denied,* 484 U.S. 977, 108 S.Ct.

488, 98 L.Ed.2d 486 (1987); *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir.1994) (the issue is "whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent"); *Pollis v. The New School for Social Research*, 132 F.3d 115, 124 (2d Cir.1997) (absent showing it was motivated by discriminatory intent, bad treatment does not establish a violation of Title VII); *Gill v. Reorganized School Dist. R-6, Festus, Mo.*, 32 F.3d 376, 379-80 (8th Cir.1994) (holding that whether the defendant's decision was incorrect or based on inaccurate information is irrelevant).

85. When the plaintiff alleges that the stated reason for the employment action is really pretext for discrimination, the Tenth Circuit "requires [the Court] to look at the facts as they appear to the person making the decision to terminate plaintiff." *Kendrick*, 220 F.3d at 1231 (citing *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1209 (10th Cir.1999)) (noting that it is the manager's perception of the employee's performance, and not the employee's subjective evaluation of her performance, that is relevant in determining pretext).

86. Even if the decision maker reached a wrong conclusion, the employer is not liable to the plaintiff unless the decision was motivated by illegal age bias. *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir.1998) (finding that plaintiff failed to establish pretext where the defendant discharged plaintiff after conducting an investigation into a

subordinate employee's allegations of sexual misconduct on the part of the plaintiff and believed the allegations to be true, even though plaintiff presented evidence to the district court that the allegations may have been false); *E.E.O.C. v. Flasher Co., Inc.*, 986 F.2d 1312 n. 12 (10th Cir.1992) ("[A] mistaken belief can be a legitimate reason for an employment decision and is not necessarily pretextual.")). So, even if Ms. Lawrence reached the wrong conclusion about the recirculation of mail, Ms. Schulte has failed to sustain her burden by showing that Ms. Lawrence's action was based on age bias.

CONCLUSIONS OF LAW: TERMINATION

87. Ms. Schulte did not establish that the proposed termination was motivated by illegal age discrimination.

88. Even if the Court were to accept Ms. Schulte's statement that she did not recirculate mail, she has failed to carry her burden in this case. In a recent case from the District of Kansas, a plaintiff was fired because the employer believed she had submitted improper expense account records. *Vega v. Sprint Corp., (PCS)*, 2004 WL 2414100, *13 (D.Kan.). (unpublished). There, the court noted that the Tenth Circuit requires examination of "the facts as they appeared to the person who made the termination decision." *See Kendrick*, 220 F.3d at 231; *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th

Cir.1998) (no pretext where defendant discharged plaintiff after investigating allegations of sexual misconduct and believed them to be true, even though plaintiff presented evidence that allegations may have been false). Here, Ms. Schulte has presented no evidence that Ms. Lawrence did not genuinely develop a belief that she had recirculated mail and act based upon that belief. Likewise, Ms. Schulte presented no evidence that Ms. Lawrence was motivated by age bias and lied about the reason for proposing Ms. Schulte's termination in order to cover up such bias.

89. "[I]t is irrelevant whether the Postal Service's decision may have been based on incorrect facts, so long as its decision was not motivated by discriminatory or retaliatory animus." *Brown v. Henderson,* 2000 WL 1762509, *8 (E.D.La.) (citing *Scales v. Slater,* 181 F.3d 703, 711 (5th Cir.1999)). (Unpublished).

90. Ms. Schulte offered evidence of allegedly discriminatory comments and employment decisions which were unrelated to either the proposed termination in March 2002 or the decision maker who initiated the March 2002 proposed termination (Ms. Lawrence). According to *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151-53, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), only actions and comments by the actual decision maker or by one who was "principally responsible" for the adverse employment action at issue is relevant. Consequently, statements and decisions by Postal officials other than Ms. Lawrence (or the Station Manager Laura

Zaremba) are irrelevant. *See Kotlowski v. Eastman Kodak Co.*, 922 F.Supp. 790, 801 (W.D.N.Y.1996) (stray comments by co-workers without supervisory control over plaintiff do not rebut defendant's stated nondiscriminatory reason for terminating plaintiff).

91. Ms. Schulte alleged that Tom Mullins asked about her retirement plans. The uncontroverted evidence established that Mr. Mullins was not the actual decision maker, nor was he principally responsible for the proposed termination of the Plaintiff. Without a nexus between Mr. Mullins' alleged inquiry and Ms. Lawrence's decision, the statement is irrelevant. Re, 29 F.3d at 1455. Moreover, comments about plans to retire or about retirement benefits are not sufficient to give rise to an inference of age discrimination and are, at best, stray comments which are irrelevant to the issue of actual age bias. *Howard v. Garage Door Group*, 2005 WL 481564 (10th Cir.) (comment by supervisor that plaintiff should check into Social Security benefits is insufficient to support inference of discrimination) (unpublished), *Holmes v. Regents of University of Colorado*, 1999 WL 285826 (10th Cir.) (plaintiff's overhearing conversations regarding the possibility of her imminent retirement was not sufficient evidence to find inference of age discrimination) (unpublished), *Thompson v. Cendant Corp.*, 130 F.Supp.2d 1255, 1262 (N.D.Okla.2001) ("remarks about the timing of future retirement made by co-workers and supervisors are best characterized as 'stray remarks' by a non-decision maker"); *see also Thomure v. Phillips Furniture Co.*, 30 F.3d 1020,

1023, 1025 (8th Cir.1994) (supervisor's suggestion that employee protesting pay cut might want to consider retiring did not reflect a discriminatory animus). The alleged inquiry regarding retirement is legally insufficient to show age bias.

92. "[A]ge-related comments by non-decision makers are not material in showing the [employer's] action was based on age discrimination." *Cone,* 14 F.3d at 531.

93. A plaintiff wishing to prove discriminatory animus with evidence that his employer treated him differently from other employees bears the burden of showing that the comparison is legally relevant, *i.e.*, that the employees were similarly situated. *Watts v. City of Norman,* 270 F.3d 1288, 1293 (10th Cir.2001), *cert. denied,* 535 U.S. 1055, 122 S.Ct. 1912, 152 L.Ed.2d 822 (2002). Ms. Schulte admitted that she and Ms. Birt were not similarly situated because Ms. Birt was willing to admit her wrongdoing and accept early settlement of her grievance.

94. The only comparable employees Ms. Schulte attempted to identify were Sherry Birt and Tony Burt, ("Mr.Burt")[1] who also received discipline as a result of improper conduct (albeit of a different sort) during the rural mail count in 2002. Importantly, the Plaintiff

1. Although Ms. Schulte identified Mr. Burt as a possible comparator employee during her trial testimony, she presented no evidence as to the specific reason for the disciplinary action taken against him, nor the resolution of those actions. Ms. Schulte also did not present any evidence as to Mr. Burt's age.

failed to introduce evidence as to either comparator's actual *age*. Without such evidence, the court cannot determine whether Ms. Birt is a legally relevant comparison or not. *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1166 (10th Cir.2000) (holding "that because plaintiff's replacement was only two years his junior, an obviously insignificant difference, the necessary inference of discrimination was precluded, and he failed to establish his prima facie case") The court cannot assume Ms. Birt is substantially younger and, consequently, cannot draw any inference because of allegedly disparate treatment of Ms. Birt.

95. Ms. Schulte only offered her own opinion of Ms. Birt's age. Case law establishes that such evidence is incompetent to create an age claim. *Nwangwa v. Federal Exp. Corp.*, 2003 WL 262057, ** 3 (7th Cir.) (where plaintiff merely offers his own opinion on alleged comparitor employees' age and disciplinary record, and the record lacks any evidence of their actual age, or disciplinary history, summary judgment was properly granted), *cert. denied*, 540 U.S. 821, 124 S.Ct. 134, 157 L.Ed.2d 41 (2003).

96. In any event, the supervisor of both Ms. Lawrence and Ms. Birt treated the workers *exactly* the same- Ms. Lawrence proposed removal for both and offered to mitigate the punishment after each worker filed a grievance.

97. In order to show a disparity in treatment that could reasonably be attributed to age, the comparison

employee should be outside the relevant protected group. The Court has no evidence whether Ms. Birt is *in* or *out* of the protected class, because Plaintiff failed to introduce evidence to establish Ms. Birt's age. *See* 29 U.S.C. § 631(a) (defining protected group as individual over 40).

98. Ms. Birt was willing to sign an agreement and compromise her grievance against the USPS to return to work. Ms. Schulte, when faced with the same proposal, refused. The USPS acted entirely consistent with a genuine belief that the removal letter was appropriate and correct. The employer may consider a failure to admit wrongdoing to administer different punishment for similar wrongdoing. *Vigil v. Colorado Dep't of Higher Educ.*, 1999 WL 407479, ** 6 (10th Cir.) (unpublished).

99. Ms. Schulte was well into the class protected by the ADEA-she was over fifty years of age-when hired at the Postal Service. This fact may be considered as weighing against her claim of a causal connection between her discipline and her age. *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174 (8th Cir.1992) (fact that plaintiff was a member of the protected age group both at the time of his hiring and at the time of his firing was significant to district court's finding of no pretext); *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1147 (7th Cir.1994) ("It seems rather suspect to claim that the company that hired [plaintiff] at age 47 'had suddenly developed an aversion to older people' two years later.").

100. Ms. Schulte may not simply point out her belief that the evidence supporting her proposed discharge was not sufficient or that further investigation should have been conducted. *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir.1998). "Title VII does not ensure that employees will always be treated fairly or that they will be [disciplined] only for meritorious reasons." *Archuleta v. Colorado Dep't of Institutions*, 936 F.2d 483, 487 (10th Cir.1991).

101. Plaintiff has not demonstrated, nor does the record suggest, any "weaknesses, implausibilities, inconsistencies, incoherencies, or contradiction in the employer's proffered legitimate reasons for its action" such that a reasonable finder of fact could find the reasons unworthy of belief. *See Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir.1997).

102. The ADEA protects older employees from being fired because of their age; it does not protect employees from being fired without good cause. *Visser v. Packer Eng'g Assoc., Inc.*, 924 F.2d 655, 657 (7th Cir.1991).

103. A court, in addressing a Title VII claim, may admit an arbitral decision as evidence and accord it such weight "as the court deems appropriate." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). The finding of the arbitrator supports this Court's finding that no pretext exists and that the reasons described in Ms. Schulte's termination letter were genuine in the mind of the decision maker.

104. Ms. Schulte apparently claims that the investigation into her recirculation was incomplete. At trial, however, she never established that the investigation regarding Ms. Schulte was any different than any other investigation ever conducted by Ms. Lawrence or the labor relations specialists. There is no evidence whatsoever regarding the investigation into Ms. Birt's wrongdoing, for instance.

105. The ADEA does not make employers liable for petty, "stupid," or "even wicked decisions"; "it makes them liable for discriminating, for firing people on account of their age." *Norton v. Sam's Club,* 145 F.3d 114, 120 (2d Cir.1998), *cert. denied,* 525 U.S. 1001, 119 S.Ct. 511, 142 L.Ed.2d 424 (1998). Even if the investigation was incomplete or unfair, plaintiff must offer evidence that the decision maker took the action that she took because of the plaintiff's age. Here, Ms. Schulte never offered any comparative evidence that Ms. Lawrence-or any other Postal employee-"would have been more diligent or careful in investigating a similarly situated, substantially younger employee (or that [s]he had a prior record of such disparate treatment)." *Crow v. Borg-Warner Automotive Diversified Transmission Products Corp.,* 2000 WL 795321, *10 (S.D.Ind.) (unpublished).

106. With respect to her claim of wrongful termination, the Postal Service is the prevailing party and shall be entitled to recovery of its costs in this matter.

Appendix B

CONCLUSIONS OF LAW: 2002 ASP APPLICATION

107. Comments and actions by persons with no connection to decisions made regarding Ms. Schulte's 2002 ASP application are irrelevant. *Furr v. AT & T Technologies, Inc.*, 824 F.2d 1537, 1547, 1549 (10th Cir.1987) (repeated statements by managers that plaintiffs were "too damned old," were too old to learn new technologies or to be in management positions, and did not have a future with the company because of age were not direct evidence of a causal relationship between discrimination and failure to promote).

108. Ms. Schulte offered her own evaluation of her skills and abilities and the subjective evaluation of her expert, Mr. Thomas Stone. However, it is the employer's perception of the plaintiff's abilities that is relevant, not the plaintiff's view of his own qualifications. *Kendrick*, 220 F.3d at 1231 ("[A] challenge of pretext requires us to look at the facts as they appear[ed] to the person making the decision to terminate [the] plaintiff."); *Furr v. Seagate Technology, Inc.*, 82 F.3d 980, 988 (10th Cir.1996) ("It is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his own relative performance."), *cert. denied*, 519 U.S. 1056, 117 S.Ct. 684, 136 L.Ed.2d 608 (1997).

109. Even if the 2002 review committee's assessment of Ms. Schulte's abilities was "incorrect, this does not show pretext unless there is reason to believe the

employer failed to exercise its business judgment in good faith." *Wiemer v. Learjet, Inc.*, 2004 WL 2526447, ** 3 (10th Cir.) (citing *McKnight*, 149 F.3d at 1129 ("An articulated motivating reason is not converted into pretext merely because, with the benefit of hindsight, it turned out to be poor business judgment. The test is good faith belief.")). The Tenth Circuit specifically cautions courts against second-guessing an employer's business judgment. *Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1261 (10th Cir.2001). Ms. Schulte has produced no evidence that any member of the 2002 review committee is lying about his or her consensus rating of Ms. Schulte's application. Ms. Schulte has also not produced any evidence that the consensus rating was the result of intentional age bias.

110. Ms. Schulte did not call one member of the 2000 ASP application review committee to testify about any matter in this case.

111. Even if Ms. Schulte experienced different results from her 2000 ASP application and her 2002 ASP application, the difference does not establish discriminatory intent. The Tenth Circuit has stated:

> Not every difference in treatment, of course, will establish a discriminatory intent. Title VII does not make unexplained differences in treatment per se illegal nor does it make inconsistent or irrational employment practices illegal. It prohibits

> only intentional discrimination based upon an employee's protected class characteristics. Human relationships are inherently complex. Large employers must deal with a multitude of employment decisions, involving different employees, different supervisors, different time periods, and an incredible array of facts that will inevitably differ even among seemingly similar situations. . . . What the law does require is that an employer not discriminate against an employee on the basis of the employee's protected class characteristics.

Kendrick, 220 F.3d at 1232 (quotations omitted). Here, Ms. Schulte is comparing the decisions made by different supervisors, separated by years, regarding her application to two different areas of operation. Comparison is not possible because Ms. Schulte has not introduced any evidence about the 2000 ASP decision makers. Even if she had, the holding in *Kendrick* renders the comparison immaterial.

112. The ASP system described by the parties has several factors which would guard against discrimination, including the use of multiple stages of elimination and multiple decision makers as well as extensive written guidelines to be used by the raters. The law does not require that all subjectivity be erased from the selection process. "[T]here is nothing unlawful about an employer's basing its hiring decision on

subjective criteria," so long as the employer's explanation of its reasons are "clear and specific in order to afford the employee a full and fair opportunity to demonstrate pretext." *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 104-105 (2d Cir.2001) (quotation marks and citation omitted); *see also id.* at 105 ("Where an employer's explanation, offered in clear and specific terms, is reasonably attributable to an honest even though partially subjective evaluation of qualifications, no inference of discrimination can be drawn.") (punctuation marks and citation omitted).

113. "Mere knowledge of an employee's age does not generate an inference that an adverse employment decision was the result of age-based bias." *Sprague v. Navistar Intern. Transp. Corp.*, 838 F.Supp. 1268, 1278 (N.D.Ill.1993), *aff'd*, 41 F.3d 1511 (7th Cir.1994). Plaintiff's expert, Mr. Stone, proceeded with the opposite supposition.

114. The testimony of former Dewar Postmaster Lynne Jones consisted of no specifics that bore any relation to Ms. Schulte's employment situation with the USPS. Her testimony was so ambiguous as to wholly fail to eliminate nondiscriminatory explanations for any disparate treatment she may have observed. *Howard v. Garage Door Group*, 2005 WL 481564 (10th Cir.) (unpublished). Evidence of some disparate treatment by the employer based on a defendant's status in a protected class is only relevant if based upon " 'comparative analysis of similarly situated

individuals." ' *Id.* (quoting *Cone v. Longmont United Hospital Ass'n,* 14 F.3d 526, 532 (10th Cir.1994)). The testimony of Ms. Jones did not concern or relate to similarly situated individuals. Ms. Schulte provided no evidence of the qualifications, nor positions of the persons about whom Ms. Jones testified and, Ms. Jones never identified any employment action by the relevant decision makers in this case-the 2002 ASP review board. Ms. Jones admitted she knew absolutely nothing about Ms. Schulte's employment with the USPS.

115. Ms. Schulte, having failed to prove that the unfavorable action on her 2002 ASP application was motivated by illegal age discrimination, is not entitled to any monetary recovery.

116. With respect to her wrongful failure to promote claim, the Postal Service is the prevailing party and shall be entitled to recovery of its costs in this matter.

117. To the extent that any of these Conclusions of Law constitute Findings of Fact, they should be so considered.

It is the Order of the Court that judgment be entered in favor of the Defendant, USPS, and against Plaintiff, Ms. Schulte.[2]

2. Defendant's Motions in Limine (Dkt.Nos.45-48) are OVERRULED. As is reflected herein, the evidence Defendant sought to exclude was considered.

Appendix B

ORDERED this 19 day of OCTOBER, 2005.

s/ Terence C. Kern,|
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA FILED NOVEMBER 2, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 03-CV-361-K(M)

KAREN SCHULTE,

Plaintiff,

vs.

JOHN E. POTTER, Postmaster General, USPS,

Defendant.

ORDER

"Plaintiff's Motion to Reopen Discovery, to Strike All Dates Presently Scheduled, and To Permit Supplement to Defendant's Motion for Summary Judgment" [Dkt. 86] is before the Court for decision. The matter has been fully briefed and the Court heard argument and evidence concerning the motion on October 26, 2004. The motion is DENIED.

Compliance with Meet and Confer Requirement

The Court finds that Plaintiff has once again failed to comply with Fed.R.Civ.P. 37(a)(2)(B) and N.D.LR 37.1 which both require that a party seeking an order to compel

discovery certify that the movant has in good faith conferred or attempted to confer with the party failing to make discovery in an effort to secure the information or material without court action.[1] At the hearing on the instant motion, Plaintiff's counsel, Robert S. Coffey, admitted he did not contact opposing counsel and made no attempt to resolve the matter before filing the instant motion because he had concluded that such an act would be futile. N.D.LR 37.1 outlines specific exceptions to the requirement of an informal conference, counsel's protestation of futility is not among the listed exceptions. The Court's Order dated July 2, 2004, notes counsel's previous similar failure to comply with the conference requirement of N.D.LR 37.1. [Dkt. 72].

Plaintiffs motion is DENIED for the failure to comply with court rules. As an alternative basis, the Court has determined that Plaintiffs motion should be denied on the basis that it is wholly without merit.

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1. Plaintiff's motion is in substance a motion to compel production of materials sought in her Requests for Production of Documents Nos. 44 and 45, despite the fact that the motion is not so titled. However, regardless of whether the motion is a motion to compel, N.D.LR. 7.1(E) requires that, prior to filing a non-dispositive motion, counsel must confer in good faith to determine if the dispute can be resolved by agreement and that the first page of any such motion shall state whether opposing counsel objects to the motion. The rule further provides that, unless the court excuses the requirement in the interest of justice, the motion shall not be considered without the statement advising of objections. Plaintiff also failed to comply with N.D.LR. 7.1.

The Court also notes that Plaintiffs motion did not contain a *verbatim* recitation or copy of the discovery requests and responses which were the subject of her motion, as required by N.D.LR 37.2(D).

Appendix C

Content of Plaintiffs Motion

In her motion, Plaintiff claims that "in response to Plaintiff's repeated requests that Defendant USPS produce statistical data of its promotion practices, Defendant repeatedly represented . . . that such evidence did not exist," and that she "has found evidence that calls into question the veracity of the discovery answers of Defendant USPS (and its further emphatic representations to the Court) concerning the availability of such statistical data." [Dkt. 86, p. 1].

In view of the serious nature of Plaintiff's allegations questioning the veracity of Defendant and its counsel, and the Court's concern about the manner in which Plaintiff has conducted discovery, it was necessary to have a clear record of the discovery requests at issue. Therefore, the Order setting the matter for hearing contained the following requirement:

> At the hearing, Plaintiff shall be prepared to specifically identify the discovery requests and responses referred to in her motion at paragraphs 1 and 3. Plaintiff shall also be prepared to establish at the hearing, by testimony or otherwise, how the evidence ". . . calls into question the veracity of the discovery answers of Defendant USPS (and, its further emphatic representations to the Court). . ." [Dkt. 86 at p. 1].

[Dkt. 89]. At the hearing, Plaintiff specifically identified only Requests for Production 44 and 45 as being the discovery requests giving rise to her current motion. Plaintiff's counsel, Mr. Coffey, mentioned four Interrogatories and two Requests

for Admission in his opening remarks and argument, but no further specific reference was made to any of those discovery requests as being the foundation for Plaintiff's current motion. Therefore, the Court has considered Plaintiffs motion only as it relates to Plaintiff's Requests for Production of Documents Nos. 44 and 45, the text of which are set forth below:

> NO. 44. Please produce any documents, whether annual or covering any other period of time, prepared by the USPS, constituting, referring or related to a compliance review by the Office of Federal Contract Compliance Programs (or if the USPS does not conduct that specific review, any equivalent or analogical documents reflecting or explaining in any statistical fashion the makeup of the USPS workforce according to age for the last ten (10) years).
>
> NO. 45. Please produce any documents, whether annual or covering any other period of time, prepared by the Tulsa District USPS, and/or by the statewide (Oklahoma) district, reflecting or explaining in any statistical fashion the makeup of the Tulsa and/or Oklahoma USPS workforce according to age for the last ten (10) years, together with any document giving instructions, directions, guidelines, or further statistical information for the purpose of properly interpreting the statistical information contained therein.

Appendix C

At the hearing and at the Court's express request, Plaintiff provided a copy of Requests 44 and 45. Defendant's responses were not provided. However, the Court found the following concerning Defendant's responses in the Court file [Dkt. 69, Defendant's Response to Plaintiff's Second Motion to Compel, filed June 28, 2004]:

> In response [to Request No. 44], the Defendant explained, in detail that it is not subject to the OFCCP which enforces and [sic] Executive Order and applies only to governmental contractors. Further, the agency objected to being tasked with identifying what it would consider to be "equivalent data. Defendant's counsel has no idea what "compliance review[s]" by the OFCCP might contain or entail and cannot reasonably be expected to find "equivalent" data. Moreover, a mere description of the "makeup of the USPS workforce according to age" over a ten year time span has no relevant application to any of Plaintiff's claims and is obviously over broad (extending to the national USPS workforce).

[Dkt. 69, p. 14]. In the same document, concerning Request 45 Defendant stated:

> Defendant maintains that the request is objectionable as it clearly reaches information and statistics not fairly implicated by any issue in this case. However, in attempt to cooperate in discovery, Labor Relations, the Postmaster's Office in Tulsa; the Manager, Post Office

Appendix C

> Operations Office in Oklahoma City, the Diversity Specialist in Oklahoma City and Headquarters for the Postal Service in Washington, D.C. were all consulted regarding the availability of such documents. Each responded that they are not aware of any such reporting of "age" information on a localized (Tulsa or Oklahoma) basis. Headquarters in Washington, D.C. specifically commented that to provide such information would require a new computer program to be written and installed.

Id. at p. 14-15.

Discussion

Although Plaintiff's motion recites that she has made repeated requests for Defendant USPS to produce statistical data of its *promotion practices*, the subject requests do not ask for that information. Requests 44 and 45 relate to documents which have been previously prepared by the USPS and which reflect, in some statistical fashion, *the makeup of the USPS's workforce* according to age for the last ten years. Asking for statistical data concerning promotion practices does not equate to asking for statistical data concerning the makeup of the USPS workforce. Consequently, the Court finds that, contrary to the representations in her motion, Plaintiff has not repeatedly requested statistical data of USPS *promotion practices*.

Request for Production Nos. 44 and 45 were the subject of an earlier motion to compel and order: Plaintiff's Second

Motion to Compel [Dkt. 65]; and Order dated July 2, 2004 [Dkt. 72]. In Plaintiff's earlier motion, she characterized these same requests as asking: "only for statistics already in the possession of the post office." [Dkt. 65, p. 11]. In the context of Request Nos. 44 and 45, the Court understands Plaintiff's use of the term "statistics" as meaning some compilation, organization or manipulation of age-related data concerning the USPS workforce, as opposed to production of raw numbers. Yet, at the hearing on the instant motion, Plaintiff's evidentiary presentation and argument focused on the ability of the USPS to extract raw data (i.e. age and position of USPS promoted employees) from USPS information systems. Plaintiff's evidentiary presentation and argument simply do not square with the language of Request Nos. 44 and 45 which clearly call for production of statistics which have already been prepared by the USPS.

Despite the fact that the Request Nos. 44 and 45 do not call for production of the information Plaintiff now seeks, Plaintiff claims that newly acquired evidence calls into question the veracity of the Defendant's discovery answers. The Court finds that Plaintiffs so-called newly acquired evidence has no such effect. The newly acquired evidence consists of the affidavit of a postal service supervisor which states that the postal service information systems contain data on the age and pay of promoted employees and that to obtain a listing of that data regarding "higher level" assignments, the coordinated efforts of Finance and Human Resources would be required. [Dkt. 86, Reinolds affidavit].[2] This

2. Defendant asserts that Mr. Reinold's affidavit was obtained in violation of Oklahoma Rules of Professional Conduct 4.2 which (Cont'd)

information is not new to Plaintiff or to the Court. When Plaintiff's Second Motion to Compel [Dkt. 65] was considered, the Court acknowledged the existence of such age-related data, but ruled that it would not require Defendant to *create* reports to respond to Request Nos. 44 and 45. [Dkt. 72, p. 5]. Plaintiff did not appeal the July 2, 2004, Order or seek reconsideration of it at the time it was issued. Considering that the July 2 Order specifically recites that the Court was attempting to "finally resolve the constantly changing discovery requests by Plaintiff" [Dkt. 72, p. 2], it is particularly inappropriate to seek reconsideration at this late stage of the case, especially when the evidence submitted is not "new."

In effect, Plaintiff's current motion seeks to rewrite Requests 44 and 45 to obtain information that was not previously requested. Plaintiff apparently now seeks information for an unspecified period of time concerning the age of persons who were accepted into the same categories of training or temporary programs or positions for which Plaintiff applied. Although Plaintiff may desire this

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(Cont'd)

prohibits a lawyer from having ex parte communication about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. This prohibition extends to some managerial personnel of the opposing party organization. 5 Okla. Stat.App. 3-A, Rule 4.2, Committee Comment, *Weeks v. Ind. School Dist. No. 1-89*, 230 F.3d 1201 (10th Cir. 2001).

On the basis of the record before it, the Court cannot determine that Rule 4.2 was violated. In any event, Mr. Reinolds affidavit has not benefitted Plaintiff's case.

information, and although it may be relevant for discovery purposes, Plaintiff's problem is that her discovery requests do not ask for this information. Since Plaintiff did not ask for the information she now seeks, it follows that Defendant cannot be held to account for having failed to produce that information.

When the interests of justice dictate, the Court may exercise its discretion and excuse a party's failure to adhere to Court rules or it may accept a broad construction of inartfully drafted discovery requests to ensure the full presentation of a party's case. The interests of justice do not support the exercise of such discretion in this case. Plaintiff has been afforded more than adequate time to develop her case, but has not been diligent in doing so. She has repeatedly failed to follow Court rules, has not properly sought discovery of the information she now seeks, and has offered only speculation that the information she now seeks would assist her case.

Conclusion

"Plaintiffs Motion to Reopen Discovery, to Strike All Dates Presently Scheduled, and To Permit Supplement to Defendant's Motion for Summary Judgment" [Dkt. 86] is DENIED.

SO ORDERED this 2nd day of November, 2004.

s/ Frank H. McCarthy
Frank H. McCarthy
United States Magistrate Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 29, 2007

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 05-5209

KAREN K. SCHULTE,

Plaintiff - Appellant,

v.

JOHN E. POTTER, Postmaster General, USPS,

Defendant - Appellee.

ORDER

Filed March 29, 2007

Before **HENRY, ANDERSON,** and **McCONNELL,** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appendix D

Entered for the Court
ELISABETH A. SCHUMAKER, Clerk

by: s/ [illegible]
Deputy Clerk

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) Effect.

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under *Rule 12* or *56* or any other motion except as provided in subdivision (c) of this rule.

Appendix E

(b) Amendment.

On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings -- or make additional findings -- and may amend the judgment accordingly. The motion may accompany a motion for a new trial under *Rule 59*. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

Federal Rule of Evidence 103(a)

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and. . . . (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.